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D.P.U./D.T.E. 97-95

Investigation by the Department of Telecommunications and Energy, on its own motion, into Boston Edison Company's compliance with the Department's Order in D.P.U. 93-37.

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I. INTRODUCTION

A. <u>Background</u>

In <u>Boston Edison Company</u>, D.P.U. 93-37 (1993), the Department of Telecommunications and Energy ("Department") approved a petition by Boston Edison Company ("BECo" or "Company") to invest up to \$45 million into a wholly-owned non-utility subsidiary, Boston Energy Technology Group ("BETG"). At the time, BECo stated that its intention was to invest in ventures related to (1) demand-side management ("DSM"); (2) the electric vehicle industry; and (3) electric generation. Subsequently, BETG amended its Articles of Organization and entered into a joint venture with Residential Communications Network ("RCN"), a cable company and BecoCom, LLC ("BecoCom"), a subsidiary of BETG ("RCN-BecoCom" or "Joint Venture"). As part of that joint venture, BECo exchanged the rights to use certain of its fiber optic lines by BecoCom in return for the rights to use certain fiber optic lines held by BecoCom. The Company neither sought nor received express Department review or approval for either of these just-described actions taken after the D.P.U. 93-37 Order.

Our approval of BECo's petition in D.P.U. 93-37 was made pursuant to G.L. c. 164, § 17A, which provides:

No gas or electric company shall, except in accordance with such rules and regulations as the [D]epartment shall from time to time prescribe, loan its funds to, guarantee or endorse the indebtedness of, or invest its funds in the stock, bonds, certificates of participation or other securities of, any corporation, association or trust unless the said loan, guaranty or endorsement, or investment is approved in writing by the [D]epartment.

In our Order, we stated that "no explicit standard of review is provided by G.L. c. 164, § 17A, or in a judicial or administrative construction of the statute." D.P.U. 93-37, at 12,

citing Bay State Gas Company, D.P.U. 19886 (1979). However, the Department "has recognized that the primary purpose of [§] 17A is to protect ratepayers by assuring a utility's stable financial condition." <u>Id.</u> In D.P.U. 93-37, at 14, the Department also found that

consistent with the <u>Bay State II</u>[¹] analysis, and with the protection of the public interest under Section 17A, . . . it is appropriate to examine the following factors when a utility proposes to invest in a subsidiary under section 17A:

- (1) the nexus between the proposed subsidiary and the company's core business;
- (2) the company's proposed investment and its total investment in subsidiaries as a percentage of the company's total equity; and (3) the methods employed in the accounting system to protect the utility's ratepayers from cross-subsidization of a proposed subsidiary by the utility.

During one of the Company's corporate restructuring proceedings in D.P.U./D.T.E. 97-63, certain intervention petitioners alleged that BECo had failed to comply with the Department's Order in D.P.U. 93-37. Partly in response to these allegations, the Department opened this investigation. After conducting a thorough and painstaking review (see Section I.B, below, for a procedural history), we have found that while BECo exceeded the investment cap set in D.P.U. 93-37 by \$3,936,881, it was largely through misinterpretations about the appropriate accounting treatment for certain transactions. We determine that returning the excess investment to BECo from BETG and then crediting to ratepayers the return the Company would have earned on that excess investment is an appropriate remedy. The remedy effects the intent of § 17A by reaffirming its "primary purpose . . . to protect ratepayers by assuring a utility's stable financial condition." D.P.U. 93-37, at 12.

Bay State Gas Company, D.P.U. 91-165 (1992).

We have also found that our Order in D.P.U. 93-37 had not set sufficiently stringent conditions to find any of the violations alleged by the Intervenors to this proceeding. Despite misgivings expressed in 1993 by one of the Commissioners in concurrence, the Department approved the Company's petition based largely on acceptance of two settlements and without setting any express limitations on what BECo could do, beyond a financial cap.² The Order in D.P.U. 93-37 thus partook of the defects inherent in the two settlements, and we find ourselves accordingly constrained in what we can do here today.

B. <u>Procedural History</u>

In D.P.U. 93-37, as noted above, the Department approved a petition by BECo to invest up to \$45 million into a wholly-owned non-utility subsidiary, BETG.³ At the time, BECo stated that its intention was to invest in ventures related to (1) DSM; (2) the electric vehicle industry; and (3) electric generation. The Order also permitted BECo to enter into a related Management Services Agreement ("MSA") and Tax Sharing Agreement between BECo and the proposed subsidiary and to issue advances to the proposed subsidiary pursuant to a Tax Sharing Agreement. In its Order, the Department accepted two settlements that resulted in approval by the Department of BECo's petition, except for the proposed Tax Sharing

Although Commissioner Kates-Garnick concurred in the outcome, she nonetheless regretted the missed opportunity to articulate appropriate standards for such transactions. D.P.U. 93-37, at 21.

As a result of two corporate restructurings approved in <u>Boston Edison Company/Boston Edison Mergeco Electric Company</u>, D.P.U./D.T.E. 97-63 (1998) and <u>BEC Energy Company/ComEnergy Acquisition</u>, D.T.E. 99-19 (1999), BECo and BETG are now subsidiaries of BEC Energy, which is in turn a wholly-owned subsidiary of NStar.

Agreement.⁴ By subsequent order, the Department approved the Tax Sharing Agreement.

Boston Edison Company, D.P.U. 93-37-A (1994).

In 1997, in part as a result of allegations made during the course of BECo's corporate restructuring proceeding, D.P.U./D.T.E. 97-63, by Cablevision Systems Company ("Cablevision")⁵ and New England Cable Television Association ("NECTA") that BECo had failed to comply with the Department's Order in D.P.U. 93-37, the Department opened an investigation, stating we would look into:

(1) whether BECo has invested an amount in excess of \$45 million in its subsidiary, BETG; (2) whether the investment of \$45 million approved by the Department was used for anything other than the three stated purposes, i.e., [DSM] services, electric vehicles, or electric generation services; (3) whether the Company has transferred any other asset to BETG without regulatory approval, and if so, whether such approval was necessary; (4) whether the Company invested any amount in the joint venture between its subsidiary, BETG, and RCN without regulatory approval, and if so, whether such approval were necessary; and (5) the Company's relationship, if any, with RCN, independent of the Company's subsidiary, BETG.

Order Opening Investigation of Boston Edison Company's Compliance with D.P.U. 93-37, D.T.E. 97-95, at 2-3 (1997) ("Order Opening Investigation").

In a subsequent order, we clarified the scope of the proceeding further, stating:

In our [Order Opening Investigation], we also noted that, while a review of BECo's compliance with D.P.U. 93-37 would necessarily focus on BECo's

On May 14, 1993, the Company and the Reading Municipal Light Department filed a Joint Motion to Approve a Settlement Agreement. On May 20, 1993, the Company, the Attorney General of the Commonwealth and the Coalition of Non-Utility Generators filed a Joint Motion for Approval of a Partial Settlement ("Partial Settlement").

Cablevision no longer transacts business in Massachusetts as a cable company. It sold its cable operations to AT&T Broadband in January 2001 (Securities and Exchange Commission Form 10-Q at I-6, n. 7 (March 31, 2001)).

ratepayers and the financial stability of BECo, the scope of this proceeding would be broader. The Department noted that the allegations that prompted investigation of BECo's compliance with D.P.U. 93-37 warranted an examination of the effect that the relationship of BECo, BETG and RCN may have had on competition in the telecommunications and cable industries.

Therefore, separate treatment of competition issues in this case is inappropriate. Noncompliance with the Department's Order in D.P.U. 93-37 would have presented an opportunity to affect competition in the telecommunications and cable industries. In other words, if there had been cross-subsidization of BETG and RCN by BECo ratepayers, then by definition there would have been an opportunity for RCN to affect competition in the telecommunications and cable industries. Thus, the scope of this proceeding need only focus on whether BECo has complied with D.P.U. 93-37 [Citations omitted].

Boston Edison Company, D.P.U./D.T.E. 97-95, at 5 (Interlocutory Order on: (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998)) ("Order on Burden of Proof").

The Attorney General of the Commonwealth ("Attorney General") filed a notice of intervention as of right pursuant to G.L. c. 12, § 11E. The following parties were granted intervenor status: Cablevision; Commonwealth of Massachusetts Division of Energy Resources ("DOER"); Eastern Edison Company ("EECo"); Enron Capital and Trade Resources ("Enron"); Local 369, Utility Workers Union of America, AFL-CIO ("Local 369"); Local 387, Utility Workers Union of America, AFL-CIO ("Local 387"); Low-Income Intervenors ("LII"); NECTA; and RCN-BecoCom. The following parties were granted limited

As a result of the Order in New England Electric System/Eastern Utility Associates Merger, D.T.E. 99-47 (2000), EECo was merged in to Massachusetts Electric Company, and its corporate existence was extinguished.

On July 20, 1998, Local 369 and Local 387 filed a Notice of Withdrawal of Intervenors.

participant status: Bay State Gas Company ("Bay State"); Cambridge Electric Light Company and Commonwealth Electric Company ("Com/Energy"); and Western Massachusetts Electric Company ("WMECo") (Hearing Officer Ruling on Motions for Leave to Intervene and for Limited Participant Status (November 26, 1997)).8

Evidentiary hearings were conducted on 27 days between December 1998 and

April 1999. The Department received testimony from a total of thirteen witnesses. As part of
its direct case, BECo presented testimony from six witnesses: Richard S. Hahn, vice-president
of technology and research (BECo), and president, (BecoCom); Douglas S. Horan, senior
vice-president, strategy and law, and general counsel (BECo); Philippe A. Frangules,
vice-president, strategy and development (BECo); Michael F. Farrell, assistant controller
(BECo); Dr. Alfred E. Kahn, Robert Julius Thorne professor of political economy, emeritus,
Cornell University, and special consultant, National Economic Research Associates, Inc.; and
Michael M. Schnitzer, director, The NorthBridge Group.

Late-filed Petition to Intervene; and (2) Denying Competition Policy Institute's Late-filed

The Department denied five late-filed petitions for leave to intervene as limited participants: MASSPIRG and the Consumer Federation of America; Massachusetts Electric Company; New Energy Ventures East; and Massachusetts Oilheat Council, Inc. (Hearing Officer Ruling Granting Cablevision's Motion to Compel with Regard to Information Request CSC 2-35; Granting BECo's Request to File Rebuttal Testimony; Denying Late-filed Petitions to Intervene as Limited Participants; and Proposing Hearing Schedule (November 17, 1998)), and Competitive Policy Institute. Interlocutory Order: (1) Denying Massachusetts Oilheat Council's Appeal of the Hearing Officer Ruling on

Petition for Limited Participant Status (March 8, 1999).

Cablevision sponsored testimony from Dr. Richard S. Silkman, consultant, Richard Silkman Associates; Gary C. Harpster, consultant, Overland Consulting; Dr. Franklin M. Fisher, professor of economics, Massachusetts Institute of Technology, and director, National Bureau of Economic Research; and Peter A. Bradford, consultant. NECTA provided testimony from Paul Glist, attorney, Cole, Raywid & Braverman, L.L.P.

On rebuttal, BECo presented testimony from John E. Antonuk, president, The Liberty Consultant Group, and Michael E. Barrett, national director for utilities, Ernst & Young, as well as further testimony from Messrs. Hahn and Kahn.

Four hundred and twenty-nine exhibits and 45 record requests were entered into evidence. BECo filed an initial and reply brief; the Attorney General, RCN-BecoCom,⁹ Cablevision and NECTA filed briefs.¹⁰

In this Order, we first dispose of BECo's pending request for protective treatment of certain documents and, next, address the following issues: (1) BECo's investment authority; (2) cash and related contributions; (3) guarantees; (4) the fiber optic network; and (5) pole attachment issues.

C. Requests for Protective Treatment

The Joint Venture's Brief consisted largely of objections to the scope of the proceeding (Joint Venture Brief at 9-13) and argument that the remedies proposed by the Intervenors were not appropriate (id. at 13-30).

The briefs were submitted on a staggered schedule, with BECo filing first and last. Some of the briefs were filed in both redacted and unredacted form.

BECo sought and was granted protective treatment for a number of exhibits at the close of hearings (Tr. 27, at 4188-89).¹¹ Left unresolved was (1) whether to accord protective treatment to certain of BECo's responses to discovery not admitted into evidence (id. at 4189); and (2) when any such protective treatment granted should expire.¹² With regard to the first issue, BECo's request¹³ for protective treatment of the responses to discovery is granted. With regard to the second issue, the protected status of exhibits expire shall expire two years from issuance of this Order, and the protected status of discovery responses not admitted into evidence shall expire one year from issuance of this Order. BECo may file a request for additional time for specific exhibits and/or discovery responses, along with appropriate support for such request, within three weeks of issuance of this Order.

Exhibits for which protective treatment was granted are designated "Confidential."

The Department takes this opportunity to remind all parties that we expect that requests for confidential treatment will be fully supported by appropriate motion, that the motion will be accompanied by a redacted and unredacted version of the document and that the motion will indicate for how long protective treatment is sought. See e.g., Order on Burden of Proof at 15.

BECo's requests are set forth in its Further Motion for Protected Treatment dated August 21, 1998 and subsequent letter dated September 10, 1998, modifying its Request, and in its Motion for Protective Treatment dated October 16, 1998. BECo is directed, within three weeks of issuance of this Order, to provide the Department with a consolidated list of all responses to information requests, not admitted as exhibits but for which protective treatment was sought.

II. COMPLIANCE WITH THE DEPARTMENT'S ORDER IN D.P.U. 93-37

A. <u>BECo's Areas of Investments in BETG</u>

1. <u>Description of D.P.U. 93-37 Order</u>

In D.P.U. 93-37, at 2, 8-9, the Department approved two settlements involving a petition by BECo to invest up to \$45 million into a wholly-owned non-utility subsidiary, BETG.¹⁰ At that time, BECo represented that BETG's contemplated scope of activity included DSM services, electric vehicles, and electric generation (Exhs. BE-DSH-4, at 6; BE-DSH-8, at 66). In D.P.U. 93-37, at 3, the Department stated that, according to BECo, "of the total proposed investment, the largest amount most likely would be invested in DSM services, with relatively smaller amounts invested in electric vehicles and electric generation services." In addition, the Department noted that "the Company stated that the requested amount of \$45 million is necessary to provide the Company with sufficient flexibility to take advantage of investment opportunities as they arise without requiring piecemeal approval through repeated application to the Department." Id.

The two settlement agreements resolved issues regarding BECo's proposal to invest up to \$45 million in BETG, and to enter into a Tax Sharing Agreement and a Management Service Agreement with BETG. As noted above, the first joint motion to approve a settlement agreement was filed on May 14, 1993, by BECo and the Reading Municipal Light Department. On June 3, 1993, a second settlement agreement was filed for approval by BECo, the Attorney General, and the Coalition of Non-utility Generators. This second agreement was a "Partial Settlement," since it did not terminate the proceeding with respect to the Tax Sharing Agreement which was resolved later in Boston Edison Company, D.P.U. 93-37-A (1994).

In D.P.U. 93-37, at 14, the Department stated that

it is appropriate to examine the following factors when a utility proposes to invest in a subsidiary under [G.L. c. 164, § 17A]: (1) the nexus between the proposed subsidiary and the company's core business; (2) the company's proposed investment and its total investment in subsidiaries as a percentage of the company's total equity; and (3) the methods employed in the accounting system to protect the utility's ratepayers from cross-subsidization of a proposed subsidiary by the utility.

Accordingly, in approving BECo's proposal, the Department affirmed that: (1) "the record reflects that there is a reasonable nexus between the proposed BETG business ventures in DSM, the electric vehicle industry, and the electric generation industry, and the Company's core business;" (2) "the Company's proposed investment of \$45 million in BETG, or approximately 4.3 percent of the Company's total equity, represents a reasonable level of investment which is consistent with the public interest of maintaining the stable financial condition of a utility and protecting the Company's ratepayers from harms associated with adverse § 17A transactions;" and (3) "the record-keeping practices described in the Partial Settlement Agreement provide additional safeguards to protect the Company's ratepayers from subsidizing the operations of BETG." Id. at 17-18.

In a concurring opinion, then-Commissioner Barbara Kates-Garnick criticized the majority's acceptance of the settlement, noting that the Department had "lost an opportunity to establish clear guidelines for this type of diversification in what is essentially a case of first impression." Id. at 21. In addition, Commissioner Kates-Garnick expressed concern that "although the Company indicated the likely areas of BETG's activities in DSM, electric generation services, and electric vehicles, the proposals presented by BECo were unformed and

essentially potential activities" whereas in previous cases "the Department had definite knowledge of the specific activities that it was approving." <u>Id.</u> at 23-24. The Commissioner pointed out that "[i]n this case, for example, the nature of BECo's investment regarding DSM services is less certain, particularly as that market attracts many new entrants. Thus . . . ratepayer interests would have been better served if the Department took a bit more time to articulate standards and review BECo's entire proposal." <u>Id.</u> at 24.

2. <u>BECo's Post-D.P.U. 93-37 Activities</u>

"engage in service or other business, operation or activity related to . . . energy generation, utilization or conservation, and electric transportation" (Exh. BE-DSH-9). In the area of electric transportation, BETG formed a separate subsidiary, TravElectric Services ("TravElectric"), in 1993 to pursue electric vehicle activities (Exh. BE-PAF-1, at 7-8). The Company represented that, because the lack of progress in battery technology slowed electric vehicle development, BETG transferred TravElectric's operations to BECo in 1996, and dissolved TravElectric in 1997 (id.). Regarding the electric generation market, the Company stated that while BETG had not found sufficient business opportunities in this field, it had provided electric distribution services to the Massachusetts Water Resource Authority and the Bermuda Electric Light Company (id. at 8-9). Concerning DSM activities, BETG formed another subsidiary in 1993, ENER-G-VISION, to provide DSM services, and acquired the assets of Rez-Tek International, a manufacturer of cooling tower ionization systems (id. at 9-10). The Company claimed that the decline of the market for subsidized DSM forced a

curtailment of ENER-G-VISION's activities in 1994, and that competition forced BETG to exit its Rez-Tek operations in 1997 (id. at 10-11). ENER-G-VISION was renamed Boston Edison Services, Inc. ("BESI") and discontinued operations in 1997 when it was transformed into an investment vehicle for EnergyVision, LLC ("EnergyVision"), BETG's energy marketing joint venture with Williams Energy Group ("Williams"), as described below (id. at 15-16). BETG still provides some DSM services through its subsidiaries, Coneco Corporation ("Coneco"), an energy service company engaged in analysis and contracting, and Northwind Boston, LLC ("Northwind"), a district cooling company that is 75 percent owned by BETG and 25 percent owned by Unicom Thermal Technologies Boston, Inc. ("Unicom") (id. at 12-14).

In 1997, BETG expanded its activities to include energy marketing and telecommunications, and on February 25, 1997, amended its Articles of Organization accordingly (Exh. BE-DSH-10, at 3). On the marketing side, BETG entered a joint venture with Williams, called EnergyVision, which was formed to market electricity, natural gas and energy services (Exh. BE-PAF-1, at 16). On the telecommunication side, BETG entered a joint venture with RCN, called RCN-BecoCom, to provide local and long distance telephone service, cable television service, and data telecommunication service (Exh. BE-RSH-1, at 12).

BECo owned through BESI, a BETG subsidiary, 50 percent of EnergyVision. Williams Holdings of Delaware, Inc. held the remaining interest (Exh. BE-PAF-2). In 1998, BETG transferred to Williams all of its interest in EnergyVision. Since that time, BESI has been dormant (Tr. 11, at 2068, 2077).

BECo owns, through BETG, 49 percent of RCN-BecoCom. RCN holds the remaining interest (Exh. BE-PAF-2).

During cross-examination in the D.P.U. 93-37 evidentiary hearings, Thomas May, then BECo's executive vice-president, asserted that BETG could not enter any businesses that were not listed in its Articles of Organization and offered the legal opinion that changes in BETG's Articles of Organization would need Department approval (Exh. BE-DSH-8, at 65-66). Nonetheless, when BETG's Articles of Organization were actually amended in 1997, Department approval was not sought (Exhs. BE-DSH-1, at 22; BECo Initial Brief at 21; see Section II.A.3.d, below, for further discussion of Mr. May's testimony).

3. Positions of the Parties

a. Attorney General

The Attorney General indicated that during the D.P.U. 93-37 proceeding, the Company never mentioned any other activities beyond DSM services, electric vehicles, and electric

Exhibit BE-DSH-8 in the instant docket consists of a transcript dated April 26, 1993, which is part of the D.P.U. 93-37 proceeding. The relevant passages of Mr. May's cross-examination by the Attorney General are reported below.

Q: Is it true that the technology group cannot legally enter into any businesses other than those listed in its articles of incorporation?

A: [MAY] That's correct.

Q: The technology group would have to change its articles of incorporation in order to enter any businesses that are not listed in the articles of incorporation; is that true?

A: [MAY] That's correct.

Q: Would the technology group have to seek approval from the Department in order to make changes in its articles of incorporation?

A: [MAY] Yes.

Mr. May is not known to be a member of the Massachusetts Bar and did not represent himself as one in D.P.U. 93-37 (Exh. DSH-4, at 1-2). Mr. May's competence to offer a legal opinion appears not be have been questioned during D.P.U. 93-37; nor was the question of the weight to be accorded what appears to be a lay opinion then raised. The transcript passage is not cited or alluded to in either the majority order or the concurring opinion in D.P.U. 93-37.

generation, and that BETG's 1993 Articles of Organization recognized this investment restriction (Attorney General Brief at 6, 9). According to the Attorney General, the Department's long-standing approach to petitions seeking investment authority under G.L. c. 164, § 17A is to require that specific information about a proposed investment be identified (id. at 6, citing Bay State Gas Company, D.P.U. 97-24, at 22 (1997)). The Attorney General maintains that such information is necessary to properly evaluate the effect of the investment on the public interest, and, specifically, to consider the nature and complexity of the proposed investment and its risks and uncertainties (id. at 6, citing Bay State Gas Company, D.P.U. 91-165 (1992)). In the absence of any discussion or evidence regarding activities beyond the three mentioned above, the Attorney General argues that the Department should determine that the D.P.U. 93-37 Order did not and could not have authorized BECo to pursue investments outside the areas of DSM services, electric vehicles, and electric generation (Attorney General Brief at 6). Accordingly, the Attorney General requested that the Department find the Company's investment in commercial telecommunication services violated D.P.U. 93-37 (id. at 11).

Finally, the Attorney General claims that the concurring opinion of Commissioner Kates-Garnick in D.P.U. 93-37 confirms the limited nature of the Department's authorization to DSM, electric vehicles and electric generation. In fact, according to the Attorney General, although Commissioner Kates-Garnick expressed her concern about the lack of specificity in the Order, she seemed certain that the Department's approval was limited to the three specified investment activities (id. at 8-9).

b. Cablevision

Cablevision claims that the <u>Order Opening Investigation</u> at 3 asked "whether the investment of \$45 million approved by the Department was used for anything other than the three stated purposes, <u>i.e.</u>, DSM services, electric vehicles, or electric generation services" (Cablevision Brief at 22). Cablevision states that the evidence is clear that BECo did invest in BETG for other purposes, namely commercial telecommunication activities, and therefore violated D.P.U. 93-37 (<u>id.</u>).

Regarding BECo's argument that D.P.U. 93-37 allowed the Company to engage in a broad spectrum of investment activities as long as they were close to BECo's core business activities, Cablevision contends that, in the past, the Department rejected petitions for approval of unlimited business activities and of investments that were inadequately specified by the petitioners (id., at 28, citing Boston Edison Company, D.P.U. 850, at 14 (1983)). Cablevision also argues that the fact that in D.P.U. 93-37, the Department noted that the three mentioned activities were closely related to BECo's core business did not authorize the Company to attribute to itself the right to determine what other activities might be related to its core business and engage in them without prior Department approval (id. at 29). Cablevision maintains that the Company repeatedly declared that cable and energy are unrelated markets during the holding company case in D.P.U. 97-63, contradicting BECo's assertion in the present proceeding that the cable market is closely related to the electric market (id. at 22, citing BECo Initial Brief, No. SJC-07787, at 15, 33, 35-36 (August 21, 1998)). In addition, Cablevision claims that the Department has previously found that telecommunications and cable television

are "non-energy-related" businesses (id. at 22, citing Standards of Conduct Rulemaking, D.P.U./D.T.E. 97-96, at 1 (1998)).

Finally, regarding BECo's argument that Mr. May's assertion during the hearings in D.P.U. 93-37 did not constitute a commitment by the Company, Cablevision argues that:

(1) during Mr. May's testimony in the D.P.U. 93-37 hearings, BECo's attorney, who was also the Company's general counsel, did not object that the questions directed to Mr. May called for a legal opinion, and made no attempt to correct Mr. May's representation under oath; (2) the Department had a right to rely on the sworn commitments of a company's officer with executive responsibilities; and (3) having obtained approval to invest in BETG, based in part on Mr. May's testimony, BECo is estopped from now taking a contrary position (id. at 27-28, citing Exh. BE-DSH-8, at 2, 12; Kanavos v. Hancock Bank & Trust Co., 14 Mass. App. Ct. 326, 333 (1982); Blanchette v. School Comm. Of Westwood, 427 Mass. 176, 184 (1998); Thomas v. Contoocock Valley School Dist., 150 F.3d 31, 44 n.10 (1st Cir. 1998)).

c. <u>NECTA</u>

NECTA states that in 1997, the Department opened an investigation on "whether the investment of \$45 million approved by the Department was used for anything other than the three stated purposes, <u>i.e.</u>, DSM services, electric vehicles, or electric generation services" (NECTA Brief at 14-15, <u>citing Order Opening Investigation</u> at 3). Since BECo admitted that its investments in telecommunication activities were part of its \$45 million investment, NECTA concludes that the approved investment of \$45 million was indeed used for other than the

purposes contemplated in D.P.U. 93-37, and therefore BECo violated D.P.U. 93-37 (NECTA Brief at 14-15).

According to NECTA, BECo's claim of authority under D.P.U. 93-37 to invest in any line of business which it deems to be closely related to its core business conflicts with the Department's legal standards for reviewing utility investment petitions under G.L. c. 164, § 17A (id.). NECTA contends that those standards require that the specific activities to be funded be identified and reviewed in order for an investment to be found consistent with the public interest (id., citing D.P.U. 93-37, at 11-15). NECTA stated that, in D.P.U. 93-37, BECo repeatedly represented to the Department that BETG would invest in the three enumerated areas, which were unregulated, energy-related, not capital-intensive, and "low-risk" ventures (NECTA Brief at 17; see Exh. BE-DSH-4, at 29). Nonetheless, NECTA asserts that BECo invested in regulated, capital-intensive, and "high-risk" activities beyond the areas of investment detailed for the Department in D.P.U. 93-37 (id. at 18, citing Tr. 25, at 3856-61). According to NECTA, the record demonstrates that those investments made beyond the three stated areas pose an entirely different range of risks and issues for Department review (id. at 19). For these reasons, NECTA argues that, in order not to undermine either § 17A or the ability of the Department to protect the public interest, the Department should reaffirm its established requirement that § 17A petitioners must present specific evidence of the nature and purposes of their proposed investments, and therefore reject BECo's position that D.P.U. 93-37 allowed it to invest in any activities related to the Company's core business (id., citing Bay State Company, D.P.U. 97-24 (1997); Boston Edison Company, D.P.U. 850).

d. <u>BECo</u>

The Company contends that neither D.P.U. 93-37 nor the settlement agreements approved by the Department in that Order limit the scope of BECo's investment through BETG to DSM, electric vehicles, and electric generation (BECo Initial Brief at 13-19). According to the Company, rather than restricting BECo's investments to any particular area, the settlement agreements instead recite that BETG is intended to "carry out activities that are separate from but closely related to the core business of the Company" (id. at 18, citing Exhs. BE-DSH-6, at 1; BE-DSH-7, at 1). Pursuant to these settlement agreements, BECo was authorized to invest up to \$45 million in BETG "as described in the Company's February 10, 1993 application, testimony, exhibits and record requests provided in the record in this docket" (id., citing Exhs. BE-DSH-6, at 2; BE-DSH-7, at 2). The Company claims that the record in D.P.U. 93-37 demonstrates that BECo clearly depicted the investments in DSM, electric transportation, and electric generation only as the initial focus of BETG and as mere examples of opportunities related to BECo's core business (id. at 14, citing Exhs. BE-DSH-3; BE-DSH-4, at 3-7; Tr. 6, at 981-82). According to the Company, during the 1993 proceeding, Mr. May clearly represented that it was difficult to provide details about BETG's future business activities, since specific investments would depend on changing market opportunities (id. at 15, citing Exh. BE-DSH-4, at 6-7, 18, 25).

The Company contends that the Department was fully aware that the three stated areas of investment represented mere examples of business opportunities and the language in D.P.U. 93-37 supports the fact that BECo was not seeking to be limited to those examples (id.

at 19). In this respect, the Company indicated that the Department recognized that "the requested amount of \$45 million is necessary to provide the Company with sufficient flexibility to take advantage of investment opportunities as they arise" (id. at 19, citing D.P.U. 93-37, at 3). Moreover, according to the Company, the concurring opinion of Commissioner Barbara Kates-Garnick supports the notion that the Department understood that the three stated activities represented only potential investment areas, and that D.P.U. 93-37 was different from previous cases in which the Department had approved investments in subsidiaries (id., citing D.P.U. 93-37, at 23).

The Company also argues that there was nothing in the settlement agreements, the Order in D.P.U. 93-37, or Massachusetts corporate law that required BETG to seek the Department's approval prior to amending BETG's Articles of Organization (id. at 21, citing Exh. BE-DSH-1, at 22). Regarding Mr. May's testimony during the hearings in D.P.U. 93-37, BECo claims that because he is not an attorney, his answer to a legal question cannot be binding on the Company (id. at 22; BECo Reply Brief at 10). The Company also maintains that Mr. May's statement constituted impermissible evidence, since Massachusetts precludes lay witnesses from testifying as to questions of law (BECo Initial Brief at 22, citing Perry v. Medeiros, 343 N.E.2d 859, 863 (Mass. 1976); Cheschi v. Boston Edison Co., 654 N.E.2d 48, 52 n.7 (Mass. App. Ct. 1995); M.S. Walker, Inc. v. Travelers Indem. Co., 470 F.2d 951, 954 (1st Cir. 1973)).

For the reasons stated above, the Company contends that the sole limitations placed on its investments in BETG by D.P.U. 93-37 were that the areas of investment be closely related

to BECo's core business activities and the investment not exceed \$45 million (BECo Initial Brief at 13, 19). The Company argues that, consistent with the Department's Order, BECo's initial investments in electric vehicles, electric services, and DSM, and later telecommunications venture, all have an inherent nexus with the core activities of electric utilities (id. at 12). The Company reasoned that there is a strong nexus between electric services and telecommunications because: (1) there are synergies between the delivery of energy and telecommunications in the areas of infrastructures, engineering, and customer service (id. at 24, citing Exh. BE-DSH-1, at 27); (2) the skills necessary to design, construct, own and maintain a telecommunication network are similar to those required to perform the same functions for an electric transmission and distribution system (id. at 24, citing Exh. BE-RSH-1, at 51; Tr. 6, at 988; Tr. 8, at 1583-84; Tr. 9, at 1719); (3) several electric utilities are engaged in telecommunication activities (Exh. BE-RSH-17); and (4) when passing the 1996 Telecommunications Act allowing registered electric holding companies to engage in telecommunication ventures, Congress expressly cited the benefits of electric utility participation in the telecommunication field and its potential role in bringing competition to that industry (BECo Initial Brief at 25; Exh. BE-DSH-1, at 27).

4. <u>Analysis and Findings</u>

Our Order in D.P.U. 93-37 explicitly discusses only activities in the areas of DSM, electric vehicles and electric generation, but does not include any provisions requiring an approval by the Department to expand the scope of the investment or to change BETG's Articles of Organization. Moreover, the settlement agreements on BECo's investment petition

do not provide any language limiting the scope of activities to the three stated areas, but instead recite that "the proposed Subsidiary is intended to carry out activities that are separate from but closely related to the core business of Boston Edison" (Exhs. BE-DSH-6, at 1; BE-DSH-7, at 1). ¹⁴ As part of the settlement agreements, the parties agreed not to oppose the Company's proposal "as described in Boston Edison's February 10, 1993 application, testimony, exhibits and record requests provided in the record in this docket" (Exhs. BE-DSH-6, at 1-2; BE-DSH-7, at 2). The Company asserts that the settlement agreements approved by the

¹⁴ At the beginning of the settlement discussions on BECo's 1993 investment petition, the Company had presented to the Attorney General a proposal where BETG, according to its Articles of Organization, was allowed to engage in "any . . . business, operation or activity which may be lawfully carried on by a corporation organized under the Business Corporation Law of the Commonwealth of Massachusetts" (Exh. AG-DSH-25, at 3). The Company claimed that because the Attorney General refused to support such application, BECo narrowed BETG's Articles of Organization to reflect only business activities in the areas of "energy generation, utilization or conservation, and electric transportation" (Exh. BE-DSH-9; Tr. 6, at 976-77, 989-92). Cablevision claims that this event strengthens BECo's commitment, as represented by Mr. May's testimony in D.P.U. 93-37, to invest only in the three stated areas and not to change BETG's Articles of Organizations without Department approval (Cablevision Brief at 23-24). BECo responds that despite this dispute, the Attorney General did not insist upon expressly restricting the scope of BETG's activities to those listed in the Articles of Organization as part of the final settlement papers (BECo Initial Brief at 21). Moreover, according to BECo, the Attorney General did not raise any objection when the Company discussed its proposed telecommunications activities in the context of BECo's restructuring settlement agreement (id.). NECTA and the Attorney General are silent on this issue. The Department normally does not accord any evidentiary value to either draft settlement documents or positions taken during settlement discussions and so does not remark on these claims. New England Electric System/Eastern Utility Associates Merger, D.T.E. 99-47, at 71-74 (2000); Massachusetts-American Water Company, D.P.U. 95-118, at 138-39 (1996); Boston Gas Company, D.P.U. 88-67, Phase One at 15-25 (1988); cf. Fitchburg Gas and Electric Light Company, D.T.E. 99-66-A at 5-6 (2001).

Department authorized BECo to invest as indicated in the entire record in the D.P.U. 93-37 proceeding (Tr. 6, at 970).

BECo's authority to engage in activities other than DSM, electric generation and electric vehicles must be considered in terms of compliance with the requirements expressed in D.P.U. 93-37, specifically, the existence of a "reasonable nexus" between BETG's operations and BECo's core business. The records of D.P.U. 93-37 reveal that the future investment opportunities to be pursued by BETG were of a more open-ended nature. During the proceeding, the Company repeatedly represented that the three mentioned activities were the initial focus of BETG, and examples of business activities related to BECo's core business (Exhs. BE-DSH-4, at 6-7; BE-DSH-3, at 1). The Company also made clear that it was looking forward to having enough flexibility to expeditiously take advantage of business opportunities without the need of repeated application to the Department (Exh. BE-DSH-4, at 7-8, 19-20).

The other two considerations, <u>i.e.</u>, the Company's proposed investment as a percentage of the company's total equity, and the accounting methods employed to protect the utility's ratepayers from cross-subsidization, are not relevant to this discussion.

Regarding Commissioner Kates-Garnick's concurring opinion, it is unclear whether she envisioned activities other than DSM, electric generation and electric vehicles when she described the Company's "likely areas of activities . . . as unformed and essentially potential activities." D.P.U. 93-37, at 23. "New markets" and "foreign investment" are mentioned, but only "new opportunities in DSM and power generation" are cited, and then as examples. <u>Id.</u> at 21-26. The Attorney General's argument that the Commissioner seemed certain that the Department's approval was limited to those three investment activities is misplaced. The Commissioner's broad recognition of the uncertain nature of the Company's proposal would instead tend to confirm that no limit in the areas of investment was established within the 1993 Order. That reading of her concurrence is consistent with its substance and, particularly, with its tenor.

The records in the D.P.U. 93-37 proceeding also demonstrate that the Company's investments in BETG would only be in activities in which BECo had expertise and that were closely related to the Company's core business activities (Exh. BE-DSH-4, at 5; Tr. 6, at 981-85). The Department finds that there is a sufficiently close nexus between BECo's provision of electric services and its investment in BETG's telecommunications activities. Specifically, we consider that there are synergies between the delivery of energy and telecommunications in the areas of infrastructures, engineering, workforce deployment, and customer service (Exh. BE-DSH-1, at 27). For example, the skills necessary to design, construct, own and maintain a cable-based telecommunications network are similar to those required to perform the same functions for an electric transmission and distribution system (Exh. BE-RSH-1, at 51; Tr. 6, at 988; Tr. 8, at 1583-84; Tr. 9, at 1719). Further, we note that several electric utilities are engaged in telecommunications activities (Exh. BE-RSH-17). Finally, in passing the 1996 Telecommunications Act that allowed registered electric holding companies to engage in telecommunication ventures, Congress expressly cited the benefits of electric utility participation in the telecommunications field and its potential role in providing competition to that industry (Exh. BE-DSH-1, at 27). As Dr. Kahn, the Robert Julius Thorne professor of political economy at Cornell University, testified in the instant docket: "ventures into the offer of telecommunications services by electric utility companies . . . are unequivocally in the public interest and therefore to be both applauded and facilitated" (Exh. BE-AEK-1, at 2). Moreover, the Intervenors do not contest the existence of a "reasonable nexus" between the provision of electric service and telecommunications ventures.

Cablevision's claim that BECo took the opposite position during the holding company case in D.P.U. 97-63 is tenuous and is not supported by sufficient evidence. In fact, it is based on characterizations made incidentally by BECo in its brief to the Supreme Judicial Court concerning Cablevision's appeal in the holding company case. The quotations reported by Cablevision refer to BECo's argument that the Company's restructuring would not have adversely affected competition in the cable industry. Finally, Cablevision's contention (Cablevision Brief at 22) that the Department previously found that the telecommunications industry is "non-energy-related" is based on the following introductory passage in D.P.U./D.T.E. 97-96, at 1:

The Department proposed the revisions in order to address concerns raised by the increasing convergence of the business of electricity and gas distribution with other, non-energy businesses such as telecommunications and cable television.

This passage actually recognizes the increasing convergence of electricity distribution with telecommunications, and the mere characterization of telecommunications as a "non-energy business" does not translate into a determination by the Department that there is no nexus between the two industries. In fact, Cablevision's contention is contradicted by the very passage on which it attempts to rely.

The Intervenors contend that D.P.U. 93-37 did not authorize the Company to unilaterally determine whether an activity was closely related to its core business. Otherwise, BECo's action not only would be inconsistent with Department precedent, but would serve to undermine § 17A. We disagree. The Order in D.P.U. 93-37 approved two settlement agreements, and the Department has previously stated that outcomes reached in settlement

discussions carry no precedential weight. Cf. Fitchburg Gas and Electric Light Company,
D.T.E. 99-66-A at 5-6 (2001) (Department is not precluded from scrutinizing independent facts arising out of settlement discussions or offers of settlement). Settlements differ fundamentally from adjudications in that a settlement may be founded on a less-than-full record or may achieve results that would differ from or even go beyond those reached or reachable through adjudication. Massachusetts-American Water Company, D.P.U. 95-118, at 138-39 (1996).
Future § 17A proceedings would not be adversely affected by the Department's conclusion that the case-specific settlements in D.P.U. 93-37 authorized BECo to engage in any activities closely related to its core business.

The Intervenors also contend that because the <u>Order Opening Investigation</u> at 3 states that the Department would investigate whether the approved \$45 million investment was used for any activity other than DSM, electric vehicles, or electric generation services, the Company clearly violated D.P.U. 93-37 because the evidence clearly demonstrates that BECo invested part of the \$45 million in the telecommunication industry. This argument misreads the <u>Order Opening Investigation</u>, which simply establishes the areas of investigation for the D.P.U./D.T.E. 97-95 proceeding, without representing how the outcome of the investigation will determine the Department's decision on the matter of BECo's compliance with the Order in D.P.U. 93-37. Cablevision's contention is logically deficient: it takes a statement about the scope of a factual enquiry, whose outcome would serve as a possible predicate for a legal judgment, as itself conclusive about what that judgment would be.

The parties offer various interpretations of Mr. May's statement made during the evidentiary hearing in D.P.U. 93-37 concerning the Company's obligation to seek Department approval before changing BETG's Articles of Organization. We note that, in fact, Mr. May was not asked whether BECo *would* seek Department approval, but he was asked a legal question as to whether BECo *"would . . . have* to seek approval" before amending BETG's Articles of Organization (Exh. BE-DSH-8, at 65-66) (emphasis added). In this respect, his answer did not constitute a commitment by BECo's executive vice-president to seek Department approval, but simply his interpretation of the law.¹⁷ The distinction is fine, but important. In any event, the Order in D.P.U. 93-37 shows no trace of Department reliance on Mr. May's lay opinion of what the law might require, offered not on direct but on cross-examination.

The Department concludes that BECo's investment into areas other than DSM, electric generation and electric vehicles did not violate D.P.U. 93-37. Specifically, we conclude that the Department did not expressly limit BECo's ability to invest in areas other than those specified in the Order and that BECo's investment in BETG was related to its core business. We also note that our approach to § 17A petitions has evolved since D.P.U. 93-37 (see discussion below, Section II.F), as has our review of offers of settlements. See e.g., New England Electric System/Eastern Utility Associates Merger, D.T.E. 99-47, at 71-74. The lack of specificity in D.P.U. 93-37 virtually requires us to make the findings we do so here today.

In the 1993 proceeding, Mr. May was asked how the Company would look at an Order explicitly conditioning any changes in BETG's Articles of Organization to Department approval, and answered that it would not be problematic (Exh. BE-DSH-8, at 101-102). Nonetheless, the Department's Order in D.P.U. 93-37 did not impose any requirements of this type.

In that light, future applicants would be well advised in § 17A petitions to make explicit the nature of the anticipated business ventures.

B. Cash Investment

1. Introduction

Part of the Company's total investments in BETG consisted of cash contributions. The parties disagree on the total amount of cash that should be included to determine whether the Company stayed within the \$45 million investment cap.

BECo stated that as of December 31, 1997, it had invested a total of \$25.2 million in its subsidiary, BETG (BECo Reply Brief at 12; Exh. BE-MFF-36 (updated summary of investments as of July 31, 1998); Tr. 15, at 2551-52). This investment included a \$6.5 million cash contribution made by BECo to BecoCom (Exh. BE-MFF-36). Cablevision contests BECo's statement of its investment, alleging that the Company invested an additional amount of \$6.5 million that was not included as part of its reported \$25.2 million cash investment (Cablevision Brief at 50).

2. Positions of the Parties

a. Intervenors

The Attorney General and NECTA do not contest the Company's claim that its investment in BETG includes cash contributions of \$25.2 million (Attorney General Brief at 11; NECTA Brief at 41). Cablevision, however, argues that the Company's witness, Mr. Hahn, testified that BECo gave \$11 million in cash to the Joint Venture in 1997 (Cablevision Brief at 50, citing Tr. 23, at 3445-46). According to Cablevision, this amount is \$4.5 million more

than BECo's 1997 cash contribution to BecoCom reported in Exhibit CSC-MFF-11 (id.).

According to Cablevision, this additional amount results in a total cash contribution of \$29.7 million, as opposed to the \$25.2 million cash investment claimed by the Company.

b. BECo

The Company argues that Cablevision initially accepted the reported cash investment as accurate and notes that both the Attorney General and NECTA accepted BECo's reported cash investments (BECo Reply Brief at 13, citing Attorney General Brief at 11, 24; NECTA Brief at 21). The Company claims that Cablevision's argument is based on Mr. Hahn's response to a misleading question posed by Cablevision's counsel. The Company states that when Mr. Hahn testified that BECo had invested \$11 million in the Joint Venture, he instead meant that BecoCom had invested that amount in the Joint Venture (BECo Reply Brief at 14). The Company criticizes Cablevision's attempt to "inflate" the Company's cash investment in its subsidiaries by capitalizing on Mr. Hahn's error (id.). According to the Company, Cablevision failed to recognize that BECo is not BecoCom and that BecoCom is not the Joint Venture (id.). The Company asserts that, other than Mr. Hahn's inadvertently erroneous response to Cablevision's misleading question, there is no evidence in the record showing that BECo directly invested any money, much less \$11 million, in the Joint Venture at any time (id.). Therefore, the Company urges the Department to reject Cablevision's "misleading" attempt to inflate the sum of its cash contribution (BECo Reply Brief at 12-13).

3. <u>Analysis and Findings</u>

Aside from Mr. Hahn's statement during cross-examination, the record is devoid of any support for Cablevision's contention that the Company's cash investment in its subsidiaries should be higher than the \$6.5 million cash contribution originally disclosed by the Company. In fact, the evidentiary record contains significant evidence to the contrary (Exhs. CSC-MFF-11; BE-MFF-36; Tr. 15, at 2551-52). Moreover, Cablevision's own witness accepted and relied upon the \$6.5 million figure in his own testimony (Exhs. CSC-CGH-1; CSC-CGH-7; CSC-CGH-8). Viewed in this context, we conclude that Mr. Hahn's reference to BECo rather than BecoCom on cross-examination may reasonably be accepted as a mistake, ¹⁸ particularly in light of the many confusing references to BECo and BecoCom in the

The following excerpt of the transcript of the cross-examination reveals that the question and answer at issue were unrelated to the general subject-matter of the cross-examination.

Q. ... The activity that was done, telecommunications activity, prior to 1996, that was utility, I take it; correct?

A. [Hahn]. . . . The utility telecommunication activities continue as of today, so it didn't end at the end of '95. But prior to 1996 I'm not aware . . . of any activity in telecommunications that was not for the electric business. Even the 1993 swap with MFS was a swap that was done for the electric business. So I think I can say that prior to [19]96 the activities that Boston Edison did in telecommunications were done for their own internal use, operation of the electric grid.

 $^{[\}ldots]$

Q. Now if you'd take a look at this document. Have you seen this before? This is the 1996 capital budget for Boston Edison.

A. [Hahn] Yes, I have seen this.

Q. And the last two pages, the last section in this, as you can see from the table of contents, is Boston Energy Technology Group. Do you see that?

A. [Hahn] The last page of this document? Yes.

Q. And this was prepared in December of '95?

A. [Hahn] That's correct.

Q. Incidentally, Edison's investment of cash into the joint venture during the (continued...)

transcript. Therefore, we find that the correct amount for determining BECo's total cash investment in its subsidiaries is \$25.2 million.

C. <u>Unpaid Invoices</u>

1. Introduction

In D.P.U. 93-37, the Department approved an MSA between the Company and its proposed subsidiary, BETG. This agreement provided for the identification of, and payment for, all services provided by BECo to BETG. Subsequently, in D.T.E. 97-63, the Department approved a revised MSA with relevant terms identical to those approved in D.P.U. 93-37. The MSA requires BECo to charge interest of twelve percent per year on outstanding amounts that remain unpaid after 30 days. In addition, BECo and BETG signed a tax agreement that allows BECo to claim BETG's reported losses as part of BECo's consolidated tax return (Exh. CSC-MFF-9). During evidentiary hearings, the Company acknowledged that it had failed to charge BETG the twelve percent interest due on unpaid bills as required by the MSA (Exh. BE-MFF-14, at 3; Tr. 15, at 2512).

calendar year 1997 was \$11 million?

^{18 (...}continued)

A. [Hahn] *Approximately*.

Q. Take a look at Boston Energy Technology Group, this section here, Page 12. Are any of the activities which are described here, any of the objectives, telecommunications activities?

A. [Hahn] Well, the primary objective I believe . . . could cover telecommunications. . . . But telecommunications is, I believe, in an unregulated core-related area, so I think it would be covered by the primary objective.

Q. Was BETG authorized to engage in telecommunications in 1995? (Tr. 23, at 3445-46) (emphasis added).

2. <u>Positions of Parties</u>

a. Intervenors¹⁹

According to Cablevision, the Company provided millions of dollars in special financial benefits to BETG in the form of (1) construction and maintenance services to BecoCom at or below cost, and (2) undercharging BETG for common corporate costs, including legal and executive services (Cablevision Brief at 74-75). By way of example, Cablevision alleges that BECo's use of an understated labor loading rate resulted in an undercharge to BETG and the Joint Venture of \$1.3 million during 1997 (id.). Cablevision cites the fact that BECo failed to bill BETG for corporate common costs until after the Department opened this investigation (id. at 75, citing Exh. CSC-GSH-1 at 33-34). Cablevision contends that these financial benefits constituted loans by BECo to BETG (id. at 75).

NECTA argues that BECo's investment in BETG should be increased by \$5.1 million because BECo did not require BETG to make timely payments on overdue amounts (NECTA Brief at 40). Like Cablevision, NECTA claims that during the 1993-1997 time period, BETG did not pay bills rendered by BECo as required by the MSA, nor did it pay any interest on overdue amounts (id.). According to NECTA, BECo did not begin charging interest to BETG on these amounts until 1998, well after the commencement of the Department's investigation (id.). In addition, NECTA alleges that BECo's failure to require BETG to pay invoices when due resulted in a reclassification of this amount, as required by both the Federal Energy Regulatory Commission's ("FERC") and the Department's Uniform System of Accounts

The Attorney General did not take a position regarding this issue.

("USOA"), from a receivable owned by an affiliated company to a loan advance made to an affiliated company (id.). NECTA claims that the Company initially included this amount as a loan advance when computing whether BECo remained within the \$45 million cap (id. at 40). However, NECTA states that BECo's counsel subsequently advised it not to consider intercompany services as an investment as defined by G.L. c. 164, § 17A (id. at 40-41, citing Tr. 16, at 2598-2600). NECTA argues that the Company was correct when it treated the unpaid invoices as a loan advance (id. at 41). Further, NECTA notes that in D.P.U. 93-37, the Company specifically sought approval for these types of advances for purposes of § 17A (id.). NECTA argues that BECo cannot claim that the \$5.1 million in "advances" for which it sought § 17A approval should now be excluded for purposes of determining BECo's compliance with the \$45 million investment cap (id.).

b. BECo

The Company admitted that it did not require payment of invoices in a timely manner nor did it charge interest on outstanding invoice balances (Exh. BE-JEA-1, at 143). The Company stated that it recognized this error and has made the necessary billing and accounting adjustments (id.).

3. <u>Analysis and Findings</u>

Under the USOA for Electric Companies, a utility's investment in affiliated companies is booked to Account 123, Investments in Subsidiary Companies. Services rendered by a utility to those affiliates are booked to Account 146, Receivables from Associated Companies. If an account receivable from an affiliate is more than one year old, the USOA requires that the

utility transfer the balance from Account 146 to Account 123. 220 C.M.R. § 51.00 et seq; 18 C.F.R. Ch. 1, part 101 at 318 Revised as of April 1999.²⁰

By its own admission, BECo failed to charge interest on overdue amounts owed by BETG in violation of both the MSA and tax agreement. The Company stated that, after reconciling intercompany services provided by BECo against income tax benefits²¹ derived from BETG, there was a net balance owed to BECo which was booked to Account 123, Investments in Subsidiary Companies, as opposed to Account 146, Accounts Receivable from Associated Companies (Tr. 15, at 2537). The Company stated that the decision to book unpaid bills to Account 123 was based solely on the Company's assumption that BETG invoices from BECo would not be paid within a year (id. at 2540). In addition, the Company explained that "any receivables from subsidiary companies that do not have a definitive term are appropriately accounted in Account 123" (id. at 2537).

From an accounting point of view, BECo booked the unpaid amounts to the appropriate accounts. However, the fact remains that the Company had not charged interest to BETG as required by the MSA. The fact that BECo booked amounts due and owing from BETG to Account 123 demonstrates the existence of unpaid invoices outstanding for more than one year, in violation of the terms of the MSA (Exh. BE-MFF-14, at 3). The Company claims it is now complying with the 30-day requirement in the MSA, and therefore, any overdue amounts are

As explained in Section II.E.4, below, the Department has adopted the FERC chart of accounts for electric companies, with several amendments.

The tax agreement permits BECo to file a consolidated tax return, which allows BECo to offset its earnings against BETG's tax liability (Exh. CSC-MFF-9).

being booked to Account 146 (Tr. 15, at 2539). However, BECo received payment of these outstanding invoices only after this investigation was initiated. The Department cannot ignore BECo's non-compliance with certain terms of a document that was expressly intended to ensure that BECo's ratepayers would not be negatively affected by BECo's financial dealings with its competitive affiliates.

More significantly, the unpaid balances owed by BETG to BECo and booked to Account 123 should have been included in the \$45 million cap. The USOA is instructive on this issue. It states in relevant part "items [in Account 146] which do not bear a specified due date but which have been carried for more than twelve months and items which are not paid within twelve months from due date shall be transferred to [A]ccount 123, Investments in Associated Companies." 220 C.M.R. § 51.00, et seq.; 18 C.F.R. Ch. 1, part 101, at 318 Revised as of April, 1999. Because the unpaid invoices to BETG were appropriately booked to Account 123, these balances should have also been included in the \$45 million investment cap prescribed by D.P.U. 93-37.

To determine the Company's investment in BETG, we will include the unpaid balance of \$3,272,450 as of December 31, 1996,²² plus \$392,694 interest due on this amount, for a

The Department has based its investigation on the Company's compliance with the terms of D.P.U. 93-37 as of December 31, 1997, a date proximate to the December 29, 1997 date that BECo submitted its prefiled testimony and exhibits. Because the USOA for Electric Companies requires that invoices to affiliates remaining unpaid one year after issuance be treated as an investment in those affiliates, it follows that those invoices that were rendered prior to December 31, 1996 and that remained unpaid would qualify for inclusion in Account 123 by December 31, 1997. Invoices issued from January 1, 1997 through December 31, 1997 would be appropriately booked to Account 146.

total of \$3,665,134. This approach is consistent with both the required accounting treatment of BECo's invoices to BETG and the use of December 31, 1997 as the basis for this investigation. This amount is incorporated in our calculations provided in Section II.F, below.

D. Guarantees

1. <u>Introduction</u>

As part of its investment in BETG, BECo issued guarantees to support obligations of Northwind and EnergyVision, two ventures owned by BETG in partnership with Unicom and Williams, respectively (Exhs. BE-MFF-1, at 4; BE-MFF-36). To effect those guarantees, BECo executed two agreements with Unicom and Williams ("Parental Agreements") (Exh. BE-MFF-1, at 5-6). Under the Parental Agreements, in the event of a call under the guarantees, each partner has an obligation to make a capital contribution proportional to its respective ownership shares (id.). If any guarantee is called, BECo would make the required payment and Northwind and EnergyVision would be required to immediately reimburse BECo for the funds expended (Exhs. BE-MFF-6; BE-MFF-7). In the event that Northwind and EnergyVision did not have sufficient funds to reimburse BECo, each partner is required to make a capital contribution to BECo in an amount equal to its pro rata share of the called guarantee (Exhs. BE-MFF-1, at 6; BE-MFF-6; BE-MFF-7). In the alternative, each partner may elect to allow its ownership share to be diluted by the amount of the unpaid capital contribution (Exh. BE-PAF-20, at 15; Tr. 16, at 2712-2713).

The Company stated that in 1993 it had not anticipated using guarantees as part of the \$45 million investment cap approved in D.P.U. 93-37, and that it would have preferred to

avoid guarantees in order to maintain a separate identity for BETG (Exh. BE-PAF-3; Tr. 11, at 2072-74). Despite its preference, BECo found it necessary to create a system of guarantees and cross-liabilities on behalf of BETG in order to assure its partners that BETG would remain able to meet its obligations (Exhs. CSC-MFF-12; CSC-DSH-1, at 6 (Confidential)). As of the close of the record, BECo was the guarantor of these liabilities.²³ For the purpose of determining the total amount of BECo's investment in BETG pursuant to G.L. c. 164, § 17A, the Company proposes to value BECo's guarantees on behalf of BETG as equal to the total exposure designated in any of the guarantees signed by BECo, a BETG partner, or both, multiplied by BETG's ownership share in Northwind or EnergyVision respectively (Exh. BE-MFF-1, at 5-10).²⁴

On October 1, 1997, BECo entered a Capital and Liquidity Support Agreement ("Support Agreement") required by BankBoston in support of a \$30 million line of credit

In 1998, when BECo reorganized under a holding company structure, BETG's ownership was transferred to the new holding company, BEC Energy Company, but the guarantees on behalf of BETG remained in BECo's name. In the same year, when BETG transferred all of its interests in EnergyVision to Williams, BECo could not exit its position as guarantor (Tr. 11, at 2075). Therefore, the Company entered into an agreement with Williams whereby BECo would be indemnified from any liabilities under the guarantees endorsed by BECo prior to the transfer of its interests to Williams (id. at 2075-76). However, BECo formally remains EnergyVision's guarantor (id.). Agreement by a third party to indemnify BECo does not change its guarantor obligation or status.

Under BECo's proposal, the resulting total amount of guarantees defined as BECo's investment in BETG is equal to 50 percent of all EnergyVision guarantees and 75 percent of all Northwind guarantees (Exh. BE-MFF-1, at 5-10).

granted to BETG (Exh. BE-MFF-1, at 15).²⁵ The Support Agreement requires the Company to retain 100 percent ownership of BETG as long as BETG's debt is outstanding, to "take all action necessary" to insure that BETG's net worth is maintained at no less than \$1 million, and to make contributions of cash or other liquid assets sufficient to permit BETG to satisfy its debt obligations (Exh. BE-MFF-11, at 2). The Support Agreement specifies that it is not a guarantee of indebtedness, and that BECo shall have no obligation to make any payments to BETG unless it receives the necessary approvals from the Department (<u>id.</u>).

2. <u>Positions of the Parties</u>

a. Attorney General

The Attorney General argues that the Company's investment in BETG should include the full face value of the guarantees (Attorney General Brief at 12). According to the Attorney General, the Company's proposal to discount the value of the Northwind and EnergyVision guarantees against contribution rights is inconsistent with G.L. c. 164, § 17A, the Company's proposal in D.P.U. 93-37, and the Department's approach to evaluating contingent liabilities (id.). In fact, the Attorney General contends that neither § 17A nor the Company's petition contain any provision for such discounting, and does not distinguish guarantees from any other investment (id. at 12-13). In addition, the Attorney General claims that Department precedent requires that, in the case of contingent liabilities, the face value of the liabilities represent the potential obligation and, therefore, the amount to be used in the application of the G.L. c. 164,

BECo's Form 10Q filed with the Security and Exchange Commission ("SEC") for the quarter ending March 31, 1998, shows that, by that date, the entire \$30 million line of credit had been exhausted by BETG (Exh. CSC-DSH-5, at 12).

§ 16 "net plant" test (id. at 13, citing Western Massachusetts Electric Company, D.T.E. 99-36, at 7 (1999)).

The Attorney General also maintains that the Company's valuation method is administratively unworkable, because in order to determine the value of the contribution rights, the Department would have to obtain and evaluate financial and operational information from entities not subject to its jurisdiction (id. at 13). The Attorney General claims that the Department has previously declined to undertake such inquiries (id. at 14, citing Boston Edison Company, D.P.U. 98-119, at 29-31 (1999)). Regarding the Support Agreement, the Attorney General contends that it should be considered a guarantee and evaluated at face value, because it commits the Company to "take all actions necessary" to maintain the net worth of BETG (id. at 15).

b. Cablevision

Cablevision argues that the principal amount of BECo's guarantees should be included in calculating the Company's total investment in BETG (Cablevision Brief at 71). According to Cablevision, the principal amount of BECo's guarantees was \$13,160,243 as of December 31, 1997 (id.). Cablevision adds that since December 31, 1997, BECo has provided additional guarantees on behalf of BETG (id., citing Exh. CSC-PAF-4). To the extent that such guarantees were issued prior to the consummation of BECo's reorganization under a holding company, Cablevision argues they should also be counted against the \$45 million cap on BECo's investment in BETG (id.).

According to Cablevision, the Company's proposal to discount the principal amount of the guarantees should be rejected for several reasons (id. at 65-66). First, Cablevision claims that the Company's use of discounting violates the commitments that BECo made to the Department when it applied for approval to invest in BETG (id. at 66). In fact, according to Cablevision, the Company stated in its initial application in D.P.U. 93-37 that the total amount of its investment, including the "principal amount of all such indebtedness guaranteed or endorsed," would not exceed \$45 million, and that no reference was made to any expected reimbursements or the degree of risk involved (id., citing Exh. BE-DHS-2, at 1). Second, Cablevision argues that the Company's proposal contradicts its own internal documents, which demonstrate that BECo expected the principal amount of the guarantees would be included for purposes of compliance with the \$45 million cap (id. at 67, citing Exh. CSC-DSH-4, at 6, 14). 26 Third, Cablevision contends that the Company's proposal is inconsistent with § 17A, because that statute does not suggest that a guarantee may be discounted in any way (id. at 68). In this respect, Cablevision argues that any suggestion that § 17A permits discounting guarantees for prospective reimbursement is improper, because if there were a call under the guarantee and BECo advances money on behalf of Northwind and/or EnergyVision in expectation of reimbursement, then this money would effectively be considered a loan and would still need to be included in the total investment under § 17A (id.). Cablevision also maintains that, if the value of a guarantee under § 17A was dependent upon particular

The cited exhibit is an internal memorandum discussing compliance with the \$45 million investment cap, where BECo's guarantee on behalf of Northwind is reported by the Company's finance officer at its full face amount.

contribution rights and the risk of actual loss, as BECo proposes, utilities would have total discretion over the amount of investment in guarantees, thus making it impractical for the Department to carry out an effective review (id. at 69). Under BECo's definition, Cablevision contends that an effective review would require the Department to evaluate risk contingencies in any guarantee arrangements and continuously monitor their change over time (id. at 69-70).

Finally, Cablevision contends that the Parental Agreements do not assign to BECo any enforceable rights of contribution; rather, they only provide that the partners would be subject to an additional capital call sufficient to enable Northwind and EnergyVision to reimburse BECo for any amount paid under a guarantee (<u>id.</u> at 70-71). However, once money is paid to Northwind or EnergyVision, Cablevision argues that it may be subject to other creditors' claims and never reach the guarantor (<u>id.</u>). Further, as an alternative to making a payment, Cablevision argues that each partner could opt to allow its ownership interest to be diluted (<u>id.</u>).

Turning to the Support Agreement, Cablevision maintains that the mere fact that the Support Agreement recites that it is not a guarantee does not change its essential nature as a commitment made by BECo to enable BETG to pay its debts (id. at 72). According to Cablevision, even if one were to accept BECo's position that this instrument was not a guarantee, the Support Agreement would still fall within the category of "other financial commitments" that BECo included as part of the \$45 million cap in its 1993 application for approval of investment under § 17A (id., citing Exh. BE-DHS-2).

c. NECTA

NECTA maintains that the principal amount of all indebtedness guaranteed by BECo must be used in determining the amount of BECo's investment in BETG for purposes of compliance with D.P.U. 93-37 (NECTA Brief at 32). At the end of 1997, NECTA states that the total principal amount of the guarantees was equal to \$13,160,243 (id. at 33). NECTA represents that both BECo's initial petition in D.P.U. 93-37 and an October 29, 1997 internal memorandum demonstrate that, prior to the present litigation, BECo fully recognized that the principal or face amount of a guarantee should be considered for purposes of § 17A compliance (id., citing Exhs. BE-DSH-2; CSC-DSH-4).

NECTA claims that the use of the principal amount of guarantees for purposes of compliance with a § 17A investment limitation is consistent with Department precedent in <u>Bay State Gas Company</u>, D.P.U. 86-268, Phase One at 4-5 (1987) (<u>id.</u>). In fact, according to NECTA, the Department recognized in D.P.U. 86-268/Phase I the full amount of the guarantee at issue in that proceeding for purposes of § 17A, even though the liability would be created only if Bay State Gas Company's then-direct subsidiary, Granite State Gas Transmission, failed to meet its obligations (<u>id.</u>).

NECTA argues that: (1) the Company admitted that, if there were a call under a guarantee, BECo would be required to pay the full amount of the guarantee, not just portions of the full amount, and only later could it require Northwind and EnergyVision to pay a pro rata reimbursement; and (2) the Company did not implement any formal evaluation of the creditworthiness of its guarantors (id. at 35-37, citing Tr. 11, at 2079-83; Tr. 15, at 2555-56). NECTA also maintains that the adoption of BECo's current approach to the valuation of the

guarantees for § 17A purposes would render it impossible for the Department to protect ratepayer interests, because it would require the Department to judge the credit quality of all venture participants and the enforceability of agreements between a utility and non-affiliated partners to reimburse amounts paid under called guarantees (id. at 35-36). In this respect, NECTA maintains that the financial ability of the venture partners may change over time, thereby affecting the utility's probable exposure under the guarantees (id. at 36). NECTA argues that the that Department is not equipped to monitor change in an unregulated company's creditworthiness (id.).

Regarding the Support Agreement, NECTA contends that, because it enabled BETG to procure a line of credit, the Support Agreement should be recognized as a guarantee or other financial commitment for purposes of § 17A (id. at 37). According to NECTA, the consequences of not treating the Support Agreement as a guarantee or other financial commitment are substantial (id. at 38). NECTA argues that the Legislature's pre-approval process under § 17A would be undermined if the Department permitted utility subsidiaries to raise funds based upon commitments of the utility to support or guarantee a subsidiary's obligations without prior approval of the amount guaranteed (id.). NECTA claims that, as a policy matter, no funds should be raised by a subsidiary until the Department has pre-approved the ultimate source of security for the transaction (id.). Otherwise, the Department would be in the difficult position of having to either (1) reject a guarantee, resulting in unregulated losses and potential harm to the utility's financial integrity; or (2) approve a guarantee even if the investment did not pass muster under § 17A standards (id.).

d. BECo

The Company claims that, under its approach to the evaluation of the guarantees, the total amount guaranteed for purposes of compliance with the \$45 million cap is equal to \$9,509,515 as of December 31, 1997 (Company Initial Brief at 64; Exh. BE-MFF-36).²⁷ The Company argues that its approach conservatively estimates its actual exposure, and, in the absence of any express authority for valuing guarantees under § 17A, is consistent with the purposes behind the \$45 million investment limit, (i.e., to maintain a stable financial condition for the utility and provide BECo with flexibility in a changing marketplace) (BECo Initial Brief at 68-69; BECo Reply Brief at 39, citing D.P.U. 93-37, at 17). The Company also maintains that its approach is consistent with well-founded legal principles that require contribution rights to be counted as assets (BECo Initial Brief at 67, citing Mellon Bank, N.A. v. Metro

Communication Inc., 945 F.2d 635, 644, 649 (3d Cir. 1991); Ollag Construction Equipment

Corp. v. Goldman, 578 F.2d 904,908 (2d Cir. 1978)).

Because it treated guarantees as actual liabilities as opposed to contingent ones, the Company argues that its proposed approach is conservative in that it overstates its liability under the guarantees. That is, BECo's valuations assumed that the Company would be called upon under each guarantee, when, in fact, BECo assumes that this eventuality is highly unlikely (BECo Initial Brief at 68-69). The Company stated that BECo's guarantees for Northwind and EnergyVision have never become actual liabilities (id. at 70).

This amount includes 50 percent of the principal amounts guaranteed on behalf of EnergyVision, or \$796,334, and 75 percent of the principal amounts guaranteed on behalf of Northwind, or \$8,713,181 (Exh. BE-MFF-36).

Regarding the Intervenors' argument that its proposal would require the Department to evaluate the credit quality of other participants, the Company noted that there were only two relevant parties to examine, <u>i.e.</u>, Unicom and Williams, which are both well-known and creditworthy institutions (<u>id.</u> at 74). According to the Company, a proper resolution of this matter only demands that the Department acknowledge the effect of the Parental Agreements (<u>id.</u>).

Concerning the Support Agreement, BECo claims that it is neither a guarantee nor a financial commitment because the language therein clearly states that it is not a guarantee of indebtedness, and that BECo is absolved of any obligations to make any payments unless and until it receives Department approval (BECo Initial Brief at 74-75; BECo Reply Brief at 40). The Company represented that even if BETG were to fail to repay its debts to BankBoston, the bank would have no recourse against BECo (BECo Initial Brief at 75). The Company stated that documents like the Support Agreement are commonly referred to as "comfort letters" to lenders (Tr. 9, at 1732).

3. <u>Analysis and Findings</u>

a. Parental Guarantees

With respect to this proceeding, the crucial component of the Parental Agreements is found in the reimbursement provisions. First, the Parental Agreements establish an obligation of unregulated companies to reimburse BECo for amounts paid under the guarantees (Exh. BE-MFF-1, at 6-7). Therefore, in order to properly monitor and determine the value of the total liabilities, the Department would need to verify the credit quality of each of BETG's

partners. This would require the Department to obtain and evaluate financial and operational information from entities not subject to our jurisdiction.²⁸ Therefore, the Department finds that this approach towards determining the value of guarantees is unacceptable, because it is cumbersome and ineffective.

Second, the Parental Agreements do not ensure BECo will receive a direct and immediate right of contribution from its partners. In the case of a call under a guarantee, BECo is still required to pay the entire amount to the lender, and only afterward will the partners in Northwind and EnergyVision be subject to an additional capital call sufficient to reimburse the Company for its <u>pro rata</u> share of the total amount paid (Tr. 11, at 2081-2082). Even assuming that a partner would not contest the capital call and be financially able to make the required contribution, ²⁹ BECo would remain liable for the entire amount guaranteed, but whether or not BECo would be made whole through indemnification by Northwind and/or EnergyVision would depend on the circumstances then extant. ³⁰ More significantly, the Parental Agreements authorize each partner faced with making a capital contribution to allow

The Company stated that it did not formally evaluate the creditworthiness of its partners, or verify its partners' statements regarding their credit history (Tr. 11, at 2079-2083).

The recent collapse of Enron may prove to be a cautionary case-in-point.

As an example of the potential flaw in BECo's proposed evaluation method, assume for illustrative purposes that the Department approves a guarantee whose actual exposure is evaluated by BECo at \$5 million based on a Parental Agreement, but whose principal amount is \$50 million. If there is a call under that guarantee, BECo, before being able to exercise its right of reimbursement for \$45 million, would first need to pay \$50 million using internal funds. In order to make such payment, BECo may be forced to divert working capital usually employed for the utility's day-to-day operation or quickly borrow at a high cost in order to cover the unanticipated loss. In either case, the Company and its service may be negatively affected.

its ownership share to be diluted by the amount due in lieu of payment (Exhs. BE-MFF-6; BE-MFF-7; BE-PAF-20, at 15; Tr. 16, at 2712-2713). Thus, if a partner of BETG exercises the option to dilute its ownership share, BECo would not receive any monetary reimbursement for its payments made under the called guarantee, and could also find its ownership share, by way of BETG, increased in proportion to the expected reimbursement. This increase in the Company's ownership interest would enlarge BECo's guarantee liability under the Parental Agreements, i.e., it would increase its estimated exposure under the guarantees. Therefore, the Company's proposed evaluation method would require the Department to continuously or at least frequently monitor the current exposure under the guarantees in order to verify whether an investment cap has been violated.³¹

Finally, BECo stated in its petition in D.P.U. 93-37 that the \$45 million investment cap requested in that case included the "principal amount of all such indebtedness guaranteed" (Exh. BE-DSH-2, at 1). Even if the Company had not expected to rely on guarantees as a means of investing in BETG, it is evident that the Company was aware of that possibility and sought to ensure that its petition in D.P.U. 93-37 provided for the use of guarantees. Because the Company's application in D.P.U. 93-37 contained no reference to any expected reimbursement, discounting, degree of risk involved or differentiation of the guarantees from any other investment, the Intervenors claim that the Company acknowledged that the guarantees should have been measured by their principal amount. BECo has not disputed this claim.

In general, the investment limit would change every time a partner exercises the option to dilute its ownership share (BE-PAF-20, at 15).

Accordingly, the Department finds that the principal amount of the guarantees entered into by the Company on behalf of BETG shall be included in the calculation of BECo's investment in BETG. Not allowing the Company's proposed discounting adjustment and disregarding the guarantees entered into by Unicom and Williams, the Department finds that the total amount guaranteed by BECo as of December 31, 1997 was \$13,160,642³² (Exhs. CSC-2-122; CSC-2-122 Supp.; CSC-2-122 2nd Supp.; CSC-GCH-7; CSC2-115; DTE-RR-3; DTE-RR-4; BE-MFF-3; BE-MFF-4; BE-MFF-8A; BE-MFF-8B; BE-MFF-8C; BE-MFF-8D; BE-MFF-8E; BE-MFF-8F; BE-MFF-8G; BE-MFF-8H; BE-MFF-8I; BE-MFF-8J; BE-MFF-8G; CSC-PAF-14).

b. BankBoston Line of Credit

Concerning the Support Agreement associated with the \$30 million line of credit to BETG from BankBoston, this document clearly states that the Company has "no obligation to make any payments to BETG . . . unless and until it shall have received necessary approvals from the Massachusetts Department of Public Utilities" (Exh. BE-MFF-11, at 2).

Notwithstanding the provisions of the Support Agreement that operate as a guarantee, (i.e., a commitment by BECo to take all actions necessary to maintain BETG's net worth), the Company is under no obligation to make any payments to BETG under this agreement in the absence of express Department approval. Therefore, the Department will not include the Support Agreement in the calculation of the Company's investment associated with BETG.

The \$401 difference from the amount claimed by the Intervenors is attributed to the correction of a \$400 error identified in the Intervenors' calculation and a rounding adjustment of \$1.

Although NECTA argues that failure to recognize the Support Agreement as an investment for purposes of § 17A may leave the Department with a "Hobson's Choice" of either approving a guarantee that fails to meet the standards of G.L. c. 164, § 17A or placing BECo in serious financial harm, the requirements of G.L. c. 164, § 17A are not merely administrative. In order to approve an investment proposal requested pursuant to G.L. c. 164, § 17A, the Department must find that the proposal is consistent with the public interest. <u>Bay</u> State Gas Company, D.P.U. 91-165, at 9, n.8. Where a petitioner proved unable to meet the public interest requirement, the Department would deny a § 17A petition. Bay State Gas Company, D.P.U. 97-24, at 23-24 (1997). If the Company were to make incorrect representations to third parties about the application of the Support Agreement, and if these third parties then acted in reliance on those representations, the risk of a future rejection by the Department would not be borne by ratepayers, but rightly by both the Company's shareholders and those third parties who relied on the Company's representations.³³ See Massachusetts-American Water Company, D.P.U. 88-172, at 7 (1989). To determine otherwise would only serve to nullify the Department's statutory obligations under § 17A. <u>Faits accomplis</u> do not prejudice statutory judgments by the Department. To the extent that rejection of the Support Agreement would harm BECo, the Department has often stated that it has no obligation to insulate shareholders who, through the actions of their own management, sustain self-inflicted wounds. See Service Quality Standards for Electric Distribution

Department approval is required pursuant to G.L. c. 164, § 17A if BECo does seek to implement the provisions of the Support Agreement.

<u>Companies and Local Gas Distribution Companies</u>, D.T.E. 99-84, at 50, n.38 (2000); <u>Blackstone Gas Company</u>, D.P.U. 511, at 7 (1981). A shareholder derivative action, not a regulatory bailout, would be the investors' remedy.

c. Conclusion

Based on the above analysis, the Department declines to adopt BECo's proposed evaluation method, and will take the guarantees at their face value, irrespective of indemnification claims. The Department also declines to include the BankBoston line of credit as a guarantee. Therefore, the Department finds that the total face value of the guarantees, <u>i.e.</u>, \$13,160,642, is an appropriate measure for the purpose of calculating the Company's total investment in BETG.

E. <u>Fiber Optic Network Investment</u>

1. Introduction

Between 1988 and 1995, BECo constructed a fiber optic network at a total cost, including construction work in progress ("CWIP"), of \$2,916,339 (Exh. AG-MFF-3). The network consists of 1906 fiber-miles along 104 route miles, for the purpose of providing communications service among the Company's office facilities and transmission substations (Exhs. BE-RSH-1, at 13; BE-MFF-1, at 10-11; DTE-MFF-4 (Confidential); AG-RSH-31). The Company booked these expenditures to plant in service and CWIP accounts (Exhs. BE-MFF-1, at 10-11; AG-MFF-1). The Company explained that while the installed

An additional 198 fiber-miles constructed along 7.5 route miles has been excluded from this route total (Exh. BE-RSH-9). The Company reported that some of these additional routes have no value except for utility purposes (id.).

network did have some use for the electric operations, it did not yet link all of its substations as a completed backbone (Exh. BE-RSH-1, at 13; Tr. 3, at 288). Thus, additional funding was necessary to complete the network (Exh. BE-RSH-1, at 13). Despite the incomplete status of the fiber network, varying market prices and technical advances in fiber optic cable during this period prompted the Company to install 552 fiber-miles of "excess" capacity that was not needed for electric operations (Exhs. BE-MFF-1, at 11; BE-RSH-9; BE-JEA-1, at 21-22).

In December 1994, the Company engaged the services of JTM, Inc. ("JTM") to evaluate the potential for communications-related activities that could benefit both BECo's core electric business and its unregulated activities (Exh. BE-RSH-6, at 6; DTE-RR-1). In May 1995, JTM presented its conclusions ("JTM Study") to the Company, and advised BECo to complete its fiber optic network with extra capacity to facilitate joint use for utility and non-utility purposes, thereby obtaining a complete network at a lower cost than would have been possible if the project were completed strictly as a regulated operation (Exhs. BE-RSH-1, at 10-11; BE-RSH-6).

In 1996, acting on the recommendations of the JTM Study, the Company authorized the expenditure of approximately \$7 million for the purpose of constructing 6048 fiber-miles along 71 route miles (Exhs. BE-RSH-1, at 13-14; BE-MFF-1, at 12; BE-MFF-35, at 1). For ease of record keeping and in view of the relatively small material effect the Company deemed the construction had on BECo's overall balance sheet (0.1 percent of utility assets as of

An additional 1224 fiber-miles were installed along 23 route-miles during 1997, of which one small section was completed in early 1998 (Exh. BE-RSH-9; Tr. 1, at 59-60, 150).

December 31, 1996), BECo explained that it initially booked the 1996 construction to utility plant accounts (Exhs. BE-MFF-1, at 12; CSC-MFF-1). In January 1997, BECo's Supervisor of Capital Investment Accounts determined that \$7,888,219 in fiber optic investment, (including \$820,628 in CWIP) that had been booked to plant was not intended for electric utility purposes (Exh. BE-MFF-40). Therefore, BECo transferred the plant to Account 186, Miscellaneous Deferred Debits, on an interim basis pending its final classification (Exhs. BE-MFF-40; CSC-MFF-1). In September 1997, BECo transferred \$5,349,994 from this account to Account 123, Investment in Subsidiaries, with additional transfers made in October and December of \$347,678 and \$1,244,033, respectively for a total of \$6,941,705 (Exhs. AG-MFF-5; DTE-MFF-12; Tr. 15, at 2475-76).

According to the Company, the 1906 fiber-miles installed prior to 1996 and used for utility purposes, and 7332 fiber-miles installed after 1996 and used for non-utility purposes, comprised two as-yet-incomplete systems notwithstanding the presence of excess capacity (Exh. BE-RSH-1, at 14; Tr. 3, at 288). In order to provide both the regulated and unregulated operations with complete networks, BECo stated that it decided to do an internal swap of each system's excess capacity (Exh. BE-RSH-1, at 14). This transaction consisted of an assignment of a right to use 888 fiber-miles of the post-1995 fiber optic construction for utility purposes, in

The 1997 construction had been initially booked to CWIP through a single capital authorization, and reclassified later that year to Account 186 (Tr. 1, at 179; Tr. 2, at 321-323, 339; NECTA-RR-16).

The Company incurred \$192,449 in allowance for funds used during construction ("AFUDC") associated with the construction of the fiber optic network (Exhs. AG-MFF-2; AG-MFF-5). BECo was to be reimbursed for this AFUDC (Exh. AG-MFF-5).

exchange for an assignment of a right to use 552 fiber-miles in excess pre-1996 utility-related capacity for non-utility purposes (id.; Exh. BE-RSH-9; Tr. 1, at 63). BECo stated that it modeled this transaction on an earlier 1993 fiber capacity swap with Metropolitan Fiber Systems/McCourt, Inc. ("MFS"), which it believed did not require Department approval (Exh. BE-RSH-5; CSC-RR-1; Tr. 2, at 352; Tr. 23, at 3562-64). As a result of the swap, two separate networks were created; one consisting of 2242 fiber-miles used for utility purposes, and one consisting of 6996 fiber-miles intended for non-utility purposes (Exhs. BE-RSH-9; BE-MFF-1, at 12; BE-MFF-35, at 1).

BECo contends that it was not required to file any information with the Department regarding the swap and characterizes the transaction as an internal BECo decision regarding the appropriate rate base accounting treatment of the costs associated with the constructed fiber capacity, versus an affiliate transaction (Exh. CSC-RSH-28; RR-DTE-9). The Company states that the Department could review the propriety of the transaction in a subsequent rate case (Exh. CSC-RSH-28). BECo reasoned that because one fiber-mile of capacity is equal to another, its ratepayers received more for the 888 fiber-miles obtained from the unregulated venture than the fair value for the 552 fiber-miles of capacity that were provided to the unregulated venture (Exh. BE-MFF-1, at 13). The Company determined that through the fiber optic swap, ratepayers received an additional 336 fiber-miles at no additional cost, while the Company was able to complete a fiber optic backbone for use in its distribution and transmission business at no additional cost to ratepayers, saving approximately \$3 million in construction costs (id.; Exh. BE-RSH-1, at 27).

After the formation of the Joint Venture in June 1997, BECo made two capital contributions to BecoCom with a total net book value of \$6,935,345, through BETG (Exh. BE-MFF-1, at 4). Virtually all the contributions consisted of 6972 fiber-miles³⁸ of the fiber optic assets that had been assigned to non-utility operations (<u>id.</u>, at 10; Exh. AG-MFF-5).³⁹ The contributions were in the form of an "indefeasible right to use" this fiber optic cable made pursuant to a License Agreement dated June 17, 1997 (Exhs. BE-MFF-1, at 10; BE-RSH-1, at 17). The License Agreement also transferred to BecoCom certain other rights, such as a right to use, at no additional charge, 150 square feet of space at each of approximately 24 access points along the fiber optic route (Exh. BE-RSH-7, Sch. 1, § 5). It also granted BecoCom the right to install, maintain and operate new fiber optic facilities in BECo's rights-of-way ("ROWs")⁴⁰ (<u>id.</u>). While BecoCom is required to pay BECo certain fees for its use of the ROWs, the \$6.9 million investment in BecoCom does not include any value attributable to the use of ROWs (Exhs. BE-MFF-1, at 14; BE-RSH-1, at 18).

According to the Company, BecoCom's 49 percent contribution to the total value of the Joint Venture consisted of both cash and the fiber optic network transferred from BECo (Exh. BE-RSH-26, at 26). For purposes of establishing BecoCom's 49 percent investment in

The remaining 24 fiber-miles had been licenced previously to MFS (Exhs. BE-RSH-5; BE-RSH-9).

A small amount of the transferred assets may have been indirectly related to fiber optic assets (Exh. DTE-MFF-4, Capital Authorization 95-231 (Confidential)).

ROWs are those easements that a utility has obtained in which the facilities necessary for the transmission and distribution of electric power and telecommunications and cable signals are located, such as poles, transmission towers and conduits.

the Joint Venture, the fiber optic assets were valued at \$11,594,396, the result of what the Company characterized as arms-length negotiations between BECo and RCN (Exhs. BE-RSH-1, at 23-24; BE-RSH-26, at 26; Tr. 14, at 2318). The Company stated that it did not hold an auction to determine the optimum value of its fiber optic networks, claiming that an auction is best used to determine the market value of discrete assets that have a well-defined function or use (Exh. BE-RSH-1, at 30). BECo maintained that while the fiber optic network is tangible, it has no commercial value unless potential bidders develop a business plan to establish exactly how the facilities would be used and BECo constructs additional facilities to connect telecommunications customers (id.). Therefore, the Company determined that an auction would not have been effective as a valuation tool.

2. <u>Cablevision Valuation</u>

Cablevision stated that BECo's fiber optic assets should have been transferred to BETG at their fair market value, as required by the Department's USOA (Exh. CSC-PAB-1, at 14-15). Rejecting both BECo's book valuation of \$6.9 million and the Joint Venture's valuation of \$11.6 million, Cablevision examined both the actual cost of the fiber optic lines and the ROWs used by the fiber optic system, as represented by the land on which BECo's transmission towers and conduits are located (Exh. CSC-RHS-1, at 7; Tr. 17, at 2826, 2830). Cablevision asserts that safety issues and the presence of only one optical wire on BECo's transmission system preclude non-discriminatory access to the Company's transmission network

As part of these negotiations, several independent appraisers were engaged to value BecoCom's contribution to the Joint Venture (CSC-RR-3 (Confidential); Tr. 28, at 4178-84 (Confidential)).

(Tr. 17, at 2806, 2832-33, 2842). Although Cablevision recognized that the underlying ROWs have limited value unless preferential access has been granted, Cablevision considered the structure of BECo's transfer of assets to the Joint Venture through BecoCom to be an improper transfer of the scarcity value of the fiber assets from regulated to unregulated operations (id. at 2842-43).

Cablevision contended that the most reliable way to determine the economic value of BECo's existing transferred fiber network is through an auction process (Exh. CSC-RHS-1, at 20-22). Using an income approach, in which the value of the asset is equal to the net present value of the stream of after-tax cash flows expected to return to the owner, Cablevision estimated the fiber optic investment value (id. at 22). Based on an examination of the market for dark and lit fiber, Cablevision concluded that the fair market value for the fiber optic system transferred by BECo was between \$39.0 and \$43.0 million (id. at 24-27; Tr. 17, at 2727). 42 However, Cablevision emphasized that the superior method of measuring the fiber optic system's market value would be through a sale or auction process (Exh. CSC-RHS-1, at 24).

Cablevision stated that, as a result of BECo's undervaluation of the transferred fiber optic assets, the Company's electric customers have had to pay higher rates than would have otherwise been required (<u>id.</u> at 4). Cablevision also faulted BECo for its failure to mitigate stranded costs to the maximum extent as required by the 1997 Electric Restructuring Act,

The original valuation provided by Cablevision's witness was between \$58.2 and \$67.0 million (Exh. CSC-RHS-1, at 26-27). On his first day of cross-examination, the witness identified several errors in his calculations which reduced the valuation to a range between \$39.0 million and \$43.0 million (Tr. 17, at 2727-29).

St. 1997, c. 164 (id. at 4-5; Exh. CSC-PAB-1, at 18-21). Cablevision compared BECo's treatment of the fiber optic assets with a 1997 decision by the New Jersey Board of Public Utilities directing GPU Energy to apply revenues from a wholly-owned subsidiary's telecommunications venture to mitigate stranded costs (Exh. CSC-RHS-1, at 35-37, citing Decision and Order, Docket No. EE97050350, State of New Jersey Board of Public Utilities, December 17, 1997).

To remedy the alleged violation of the investment limitations in D.P.U. 93-37, and the Company's failure to fully mitigate stranded costs, Cablevision proposed that the Department order BECo to sell all of its tangible and intangible assets at auction, in order to receive the maximum value for the benefit of electric ratepayers (Exhs. CSC-RSH-1, at 28; CSC-PAB-1, at 30). In the alternative, Cablevision recommended that the Department require the Joint Venture to convey to BECo's electric consumers an amount equivalent to the fair market value of the transferred assets (Exhs. CSC-RSH-1, at 28; CSC-PAB-1, at 29).

3. <u>Positions of the Parties</u>

a. Attorney General

The Attorney General contends that the fiber network transferred to BETG was utility plant necessary for the provision of utility service, and recommends that the Department evaluate the transfer of the fiber optic network (Attorney General Brief at 17, citing 220 C.M.R. § 12.04). To the extent that a transfer is approved, the Attorney General urges the Department to ensure that BECo's ratepayers receive the benefit of the market value of the plant that the Company transferred to its non-utility business (id. at 17).

According to the Attorney General, the Company understated its investment in BecoCom by failing to recognize the market value of BECo's property being transferred to the unregulated affiliate (id. at 15-16). The Attorney General cites long-standing Department policy regarding the gain on the sale of utility property, which provides:

If utility assets are recorded above-the-line, ratepayers support those assets through the utility's allowed rate of return. Therefore, if the property is later sold by the utility, an adjustment is necessary to flow through to ratepayers the appreciation on assets that they have supported in rates reflected by a return on the investment. Barnstable Water Company, D.P.U. 93-223-B at 12-13 (1994); Commonwealth Electric Company, D.P.U. 88-135/151, at 92 (1989). This policy also applies to non-utility plant if such plant had been previously included in utility plant in service regardless of the length of time the plant had been treated as plant in service. Western Massachusetts Electric Company, D.P.U. 88-250, at 38-39 (1989).

(id., citing Boston Edison Company, D.T.E. 97-63, at 42).

The Attorney General states that BECo first recorded the post-1995 fiber optic network construction as utility plant. Accordingly, the Attorney General submits that the Department should require the Company to flow back to customers the excess market value over book (id. at 17). The Attorney General also argues that the 1997 Electric Restructuring Act requires an electric company to mitigate its stranded cost associated with the divestiture of its generation business (id. at 18, citing G.L. c. 164, § 1). The Attorney General contends that the Department has defined the category of assets subject to the mitigation requirement as both assets that have been included in rate base, and assets that have been included in plant in service and have been placed into service for the benefit of ratepayers (id. at 18, citing Standards of Conduct, D.P.U./D.T.E. 97-96, at 20).

The Attorney General argues that the Department should reject BECo's arguments that the plant was never included in the rate base calculation and that the plant had been booked in error to utility plant (id. at 18-19). First, the Attorney General maintains that neither the Department's Standards of Conduct or precedent require that the plant be in rate base to have the benefits flow to customers (id. at 19). Because these costs were included in transmission operating and maintenance ("O&M") expense, the Attorney General argues that the Company's ratepayers have incurred significant costs associated with the 1996 and 1997 fiber network additions through planning, designing, developing, engineering and supervising the network (id.). Second, the Attorney General submits that the Company intentionally put customers at risk for the investment by recording the plant on the utility balance sheet, accruing AFUDC, depreciating the plant, and affecting utility income during a period when its cost of service and base rates were under review in both its last base rate case, D.P.U. 92-92 (1992), and its Restructuring Settlement Agreement in D.T.E. 96-23 (1998) (id. at 20). According to the Attorney General, because the Company always intended to have a complete fiber ring, the post-1995 additions were necessary utility plant additions regardless of whether some of the plant might be used for non-utility purposes (id. at 20-21). Further, the Attorney General asserts that if the Joint Venture had not been formed, the Company would have never reclassified the plant (id. at 21).

Regarding the fiber optic swap, the Attorney General contends that there is little evidence to support BECo's position that the 552 fiber miles given up were of equal or lesser value than the 888 fiber miles received. Therefore, the Attorney General recommends that the

Department require a market value test of the fiber swap to ensure that customers are at least as well off as before (id.). The Attorney General maintains there are two legitimate market valuation techniques available to the Department. First, the Attorney General points to Cablevision's valuation of between \$39 million and \$43 million (id. at 22, citing Exh. CSC-RSH-1, at 4, 26-27). Second, the Attorney General proposes a method based on an agreement between BecoCom and MCIMetro, which he considers to be a better proxy because the valuation is based on the Company's own fiber assets and is uninfluenced by any terms or agreements associated with the Joint Venture agreements (id. at 22, citing Exh. AG-RSH-29). Based on the MCIMetro licence fee and net present value associated with the monthly lease rate, the Attorney General proposes a somewhat lower market valuation than the one developed by Cablevision for the Company's transferred fiber optic network (id. at 22-23, citing Exh. AG-RSH-29; RR-AG-7 (Confidential)).

As a remedy for the Company's alleged violations of Department policy, the Attorney General proposes that the Department require BECo to divest its interest in the Joint Venture and return any resulting gain to its utility customers (id. at 24-25). In the alternative, the Attorney General recommends that the Department allow the Company to retain its interest in the Joint Venture but require that BECo: (1) mitigate stranded costs by the difference between the market and book value of the property transferred from BECo to BecoCom; and (2) refund to its ratepayers its share of all retail revenues collected by the Joint Venture (id. at 25). To determine market value, the Attorney General recommends that the Department rely on either Cablevision's market value estimates, the Attorney General's estimates, or an open bidding

process conducted by an objective third party (id.). The Attorney General also suggests that BECo be assessed a civil penalty commensurate with its violations of Department regulations, in order to deter improper behavior in the future (id. at 26, citing G.L. c. 164, § 1F(7); 220 C.M.R. § 12.05).

b. NECTA

NECTA considers all of the fiber optic network built between 1988 and 1997 a utility asset used to provide electric service and carry out BECo's public service obligations, and, therefore, subject to the Department's treatment of gains and losses on utility plant (NECTA Brief at 22-23, citing D.T.E. 97-63, at 17). NECTA maintains that the Company admitted that the investments were placed in BECo's electric plant accounts and that Department precedent is not dependent on the length of time that an asset has been treated as plant in service (id. at 22). Moreover, NECTA argues that BECo accrued AFUDC on the post-1995 construction that applies solely to electric plant in service construction work (id. at 24). NECTA further points to a 1986 report by Coopers & Lybrand commissioned by BECo, which recommended that BECo construct a fiber optic network to modernize its internal network, improve reliability of its electric service and reduce the amount of private line service which BECo purchased from New England Telephone and Telegraph Company, as further support for the utility use of the fiber optic system (id. at 23, citing Exhs. AG-RSH-9; CSC-RSH-6).

NECTA characterizes BECo's fiber optic swap as an "undocumented, post-hoc fiction" by the Company to conceal violations of the investment cap requirements of D.P.U. 93-37 (id. at 28). First, NECTA argues that because BECo did not create a non-utility network with the

post-1995 construction, a swap of regulated and unregulated fiber optic capacity could not have taken place (id. at 28). Second, NECTA claims that BECo presented no evidence that the swap ever occurred or was under consideration until after the deal with RCN closed and the risk of loss from the fiber had been eliminated. According to NECTA, there is no written documentation and BECo's witnesses presented contradictory oral testimony as to the timing of the swap (id. at 28-29, citing Exh. CSC-RSH-43 (Confidential)). Third, NECTA maintains that there is no physical, functional or accounting basis for distinguishing between the pre-1996 and post-1995 construction. According to NECTA, the entire fiber optic network was part of BECo's original plan since 1986 to upgrade its transmission backbone for utility purposes (id. at 29). Finally, NECTA states that the Company's 1993 fiber swap with MSF cannot be relied upon as precedent for the existence or propriety of the swap at issue, because the MFS swap was a documented arm's length agreement between two companies that did not involve any change in the accounting treatment of an ongoing utility plant construction project between utility and non-utility operations (id. at 29, citing Tr. 5, at 859-861).

NECTA concludes that the value of the contributed asset should be based on the fair market valuation performed by Cablevision, ranging between \$39.0 and \$43.0 million (id. at 30). NECTA characterizes Cablevision's assumptions as conservative in comparison to those used by BECo's consultant, JTM, thus producing a lower valuation (id. at 30-31).

c. Cablevision

Cablevision argues that the appropriate dividing line of events is not between the pre-1996 and post-1995 fiber optic network construction, but between BECo's pre-Joint

Venture treatment of the network as a utility asset and BECo's post-Joint Venture attempts to "unlawfully transfer" the value of the fiber optic network and utility ROWs at value from ratepayers to shareholders (Cablevision Brief at 32). According to Cablevision, the record demonstrates that the fiber optic network that BECo transferred to BecoCom was a utility asset and, therefore, should have been transferred at its fair market value pursuant to Department policy (id. at 30). Therefore, Cablevision contends that BECo understates the true amount of its investment in BETG and has violated the \$45 million investment limit imposed by D.P.U. 93-37 (id. at 31).⁴³

Cablevision relies on the Department's standard for recording affiliate transfers which requires that such a transfer inure to the benefit of ratepayers (id. at 33-34, citing D.T.E. 97-63, at 42; Assabet Water Company, D.P.U. 95-92, at 29 (1996); New England Telephone and Telegraph, D.P.U. 86-17, 13-15 (1986); D.P.U. 88-135/88-51 (1989); Standards of Conduct, D.P.U./D.T.E. 97-96, at 20). Cablevision asserts that this precedent applies to BECo because all of its construction had the same utility-related purpose of replacing BECo's aging and obsolete internal utility communications system (id. at 35). Moreover, Cablevision maintains that BECo originally accounted for all of the fiber optic network as utility property as required by the USOA, which requires that the entire cost of the fiber optic network be included in utility plant in service and that any compensation BECo receives from

Cablevision maintains that even if the Department applies an original cost valuation to the transferred assets, BECo's investment would far exceed the \$45 million limitation prescribed in D.P.U. 93-37, because the actual construction cost associated with the assets were significantly in excess of the Company's claimed book value (id. at 76, citing Exh. CSC-RSH-38 (Confidential)).

BecoCom should be included in Other Operating Revenues (id. at 38, citing Exh. CSC-GCH-1, at 11).

Cablevision dismisses the Company's representations about surplus capacity on the fiber optic network not qualifying for rate base inclusion, reasoning that the installation of excess capacity can be the least-cost method of creating an internal utility communications system (id. at 45-46, citing Exh. BE-JEA-1, at 22; Tr. 18, at 2986). Moreover, Cablevision argues that the Department previously has recognized that the mere presence of surplus capacity on a fiber optic network would not render the entire network unrecoverable in rates (id., citing NYNEX <u>Price Cap</u>, D.P.U. 94-50, at 295-296 (1995)). Cablevision maintains that the post-1995 construction could have met the prudent, used and useful standard that the Department applies for inclusion of assets in rate base, because the completion of the loop was essential for utility communications purposes and was in service and providing benefits to ratepayers (id. at 48, citing Tr. 24, at 3818). According to Cablevision, BECo's claim that the Department would never have allowed such costs to be included in rate base is irrelevant, because the actual issue is how the transfer of the assets to BecoCom should have been recorded (id. at 48). Therefore, Cablevision recommends that the Department reject BECo's claim that the post-1995 fiber optic network is a non-utility asset (id. at 39).

Cablevision characterizes BECo's description of the fiber optic swap as "a bizarre and undocumented tale" devoid of credibility for a number of reasons (id. at 40). First, Cablevision asserts that BECo has not explained why a utility would suddenly stop building one network before it was complete, only to invest millions of dollars in a second, incomplete network

before it determined how to complete either of them (id.). Second, Cablevision argues that even though BECo claimed that its post-1995 construction was non-utility, the plant remained booked to BECo's utility accounts (id. at 40-41). Third, Cablevision maintains that BECo's capital authorizations for the post-1995 construction continued to state that the network was being built for internal communications needs and that BECo acknowledged its need and intent to complete the fiber optic network for utility purposes (id. at 41). Fourth, Cablevision contends that BECo's internal fiber swap is not comparable to its swap with MFS, because, unlike BECo's internal swap, the MFS swap involved an arm's length transaction with an unaffiliated party that was documented in a contract (id.). Fifth, Cablevision argues that testimony provided by several BECo witnesses regarding the date of the swap is contradictory (id. at 42, citing Tr. 2, at 349; Tr. 14, at 2401-2402; Tr. 24, at 3644, 3708-3709). Finally, Cablevision points out that no documentation exists to support the swap (id. at 42). In conclusion, Cablevision asserts that the idea of a swap was developed to shift the benefits of the fiber optic network from ratepayers to shareholders (id. at 43).

Cablevision concludes that BECo violated the \$45 million limit imposed by the settlement agreements, because the transfer of the fiber optic network and other rights to BecoCom should be based on Cablevision's \$43.0 million estimate of fair market value for lit fiber³⁹ (<u>id.</u> at 60-61). Cablevision states that lit fiber is the most appropriate measure of the

Cablevision faults BECo's argument that the percentage of book equity existing in D.P.U. 93-37 represents the appropriate criteria for evaluating the \$45 million cap on BECo's investment in BETG, because BECo's witness, Mr. Antonuk, testified that the \$45 million figure was absolute and does not fluctuate with changes in BECo's equity (continued...)

network's value, because it is based on the highest and best use of the network in the wholesale fiber network (id. at 55-56, citing Exhs. CSC-RHS-8 (Rev.); CSC-RSH-1, at 24).

d. BECo

First, the Company contends that excess capacity existed on its pre-1996 fiber network, because while the Company installed fiber with an average capacity of 18.3 strands to provide system redundancy, advances in the electronic devices that transmit signals through fiber strands demonstrated over time that fewer strands would be required to carry the same volume of data traffic (BECo Initial Brief at 28, citing Exh. BE-JEA-1, at 21-22). Therefore, according to BECo, its average pre-1996 system capacity of 18.3 strands has been and is expected to remain above the maximum 12-strand capacity that is required for utility use (id.).

Second, BECo claims that the fiber optic facilities that it constructed after 1995 were not utility assets (id., citing Exhs. BE-RSH-1, at 10; BE-JEA, at 26). BECo states that the JTM Study concluded that BECo should complete the fiber optic network with additional capacity to allow joint use of the network for both utility and non-utility purposes, a function consistent with both the 1996 Telecommunications Act and Congressional intent to allow utilities to enter the cable business (id. at 28-31, citing Exh. BE-RSH-1, at 10-11). BECo contends that the JTM Study suggested that it would get a completed network at a lower cost than if it completed the network solely as a regulated utility project. Additionally, the Company claims that the JTM Study recommended that it explore energy management systems that would provide real

^{(...}continued)
(Cablevision Brief at 55, <u>citing</u> Exh. JEA-1, at 55 n.21a).

time, two-way interactive communications between BECo and its customers (id. at 32, citing Exh. BE-RSH-1, at 11). With regard to unregulated operations, BECo asserts that the JTM study advised BECo to: (1) license capacity on the fiber optic network to others and develop a partnership with a personal communications system ("PCS") provider to offer telecommunications services; (2) develop a partnership with cable operators for a joint fiber optic network build-out; and (3) engage in long-distance telephone resale operations (id. at 32, citing Exhs. BE-RSH-1, at 11; BE-RSH-6).

BECo alleges that it sought to implement these recommendations by completing its fiber optic backbone as a non-utility investment and setting up a separate cost area associated with this project, but was initially unsuccessful because other telecommunications and cable providers were not interested in having BECo construct large networks for them (id. at 32-33, citing Exhs. BE-RSH-1, at 12, 38-39; BE-JEA-1, at 27; Tr. 2, at 389-390, 392; Tr. 25, at 3911-3912). BECo then decided to broaden its search to include competitive local exchange carriers ("CLECs") that had little or no market presence in BECo's service territory, 40 and ultimately formed a joint venture with RCN (id. at 41-42, citing Exh. BE-RSH-1, at 12).

BECo contends that it never intended the post-1995 investment to be considered a utility asset.⁴¹ This position, according to BECo, is supported by the executive summary of the capital

The four companies were Brooks Fiber, Hyperion, Intellcom, and RCN (BECo Initial Brief at 42).

BECo asserts that its pursuit of unregulated activities is not novel, as evidenced by the steam heat business it conducted between 1900 and 1986, for which it set up a distinct set of cost areas to separate the steam heat business activities from the regulated ones (BECo Initial Brief at 42, citing Tr. 3, at 475).

authorization papers, which discuss the benefits to both utility and non-utility operations from the fiber optic project (id. at 35, citing Exh. BE-RSH-8, at 2). BECo emphasizes that ratepayers would never have been expected to assume the costs or risks associated with any new business opportunities that BECo may have been seeking beyond electric services (id. at 35-36; BECo Reply Brief at 27). Moreover, BECo maintains that the Department would not have allowed the inclusion of the post-1995 investment in rate base, because the construction would not have met the Department's prudence or used and useful standards (BECo Initial Brief at 38, citing Boston Gas Company, D.P.U. 96-50, at 15 (1996); Western Massachusetts Electric Company, D.P.U. 84-25, at 37 (1984); Western Massachusetts Electric Company, D.P.U. 18731, at 22 (1977)). BECo asserts that although the original accounting entries regarding the post-1995 fiber optic facilities had recorded the project in utility plant construction accounts, once the Company discovered that it had improperly accounted for that construction, it corrected the error and transferred the costs of the non-utility portion of the network out of the utility plant accounts (id. at 41; BECo Reply Brief at 16-17, citing Exh. BE-MFF-40). Therefore, BECo concludes that the portion of the fiber optic network built after 1995 was properly characterized as a non-utility asset (BECo Initial Brief at 41).

Third, BECo argues that the fiber optic swap between the regulated and unregulated sides of BECo was a proper transaction which favored ratepayers. BECo stresses that it had two fiber optic facilities; one constructed before 1996 as a utility asset with marginal excess capacity; the other constructed after 1995 as a non-utility asset, but that neither formed a complete network (id. at 42). BECo indicates that by exchanging fiber optic capacity between

the regulated and unregulated businesses, the two networks would have the ability to serve distinct purposes (id. at 42). BECo points to the 1993 MFS fiber capacity swap in support of both its treatment of the transaction and the required regulatory approval (id. at 43, citing CSC-RR-1; Tr. 2, at 352; Tr. 23, at 3562-64). Thus, BECo reasons that, similar to the MFS swap, no Department approval was necessary for the fiber optic swap between its regulated and unregulated businesses (id. at 44-45).

Fourth, BECo maintains that there is no rule that would require the transfer be made at the higher of fair market value or book value, because the fiber optic network was not a utility asset and was not included in rate base (id. at 47-48, citing Standards of Conduct, D.P.U./D.T.E. 97-96, at 18; Boston Edison Company, D.P.U. 97-63, at 33). Moreover, BECo claims that because the contribution constituted an investment in BETG through its subsidiary, Department approval was not required (id. at 48). BECo contends that the transfer of an unregulated asset to an unregulated affiliate is not unprecedented, pointing to the sale of its unregulated steam heat business to Boston Thermal in 1986, with the gain on the sale of the assets going to shareholders, not ratepayers (id. at 49). BECo argues that valuing the transfer at book value is consistent with the basis relied upon by the Department in setting the \$45 million investment cap in D.P.U. 93-37 (id. at 50-51, citing D.P.U. 93-37, at 17; Exh. BE-JEA-1, at 67; Tr. 25, at 3865-3866; BECo Reply Brief at 15).

Fifth, BECo contends that once it contributed the non-utility asset to BecoCom,
BecoCom rightly sought to obtain its maximum value during negotiations with RCN (BECo
Initial Brief at 51, citing Exh. BE-RSH-26, at 3). According to BECo, under the terms of the

Joint Venture, BecoCom's contribution of assets and cash combined had to equal 49 percent of the total value of the Joint Venture (id. at 52-53, citing Exh. BE-RSH-26, at 26). BECo explains that the smaller the value ascribed to the right to use the fiber optic network, the larger the cash contribution it would have made to the Joint Venture (id. at 53). Conversely, RCN had a strategy in minimizing the value of the right to use the contributed assets, in order to increase the cash contribution required from BecoCom. BECo maintains that the \$11.6 million valuation negotiated between BecoCom and RCN is a sound measure of the actual market value for the asset, assuming it was necessary to establish that value for other purposes (id., citing Exh. BE-RSH-26, at 3; Tr. 23, at 3560-61, 3536, 3538).

BECo faults both Cablevision's and the Attorney General's estimates as overstating the value of the fiber optic network. BECo submits that Cablevision's "corrected" analysis regarding dark fiber possesses several errors, because the analysis (1) misuses many examples that it cites; (2) fails to take account of material changes in the fiber marketplace; (3) fails in some of its examples to reduce revenues by the costs of owning the assets that produce such revenues; (4) makes speculative and unsupported assumptions with respect to business opportunities and the costs of pursuing them; (5) does not provide sufficient information to verify claimed representations of value from alleged "market" sources; and (6) ignores readily available evidence of value (id. at 55, citing Exh. BE-JEA-1, at 69, 72; BECo Reply Brief at 31-33). The Company maintains that, even if one were to accept Cablevision's methods and

The Company notes that Cablevision's witness originally calculated a market value for the fiber optic network between \$58.2 and \$67 million and did not divulge errors in his calculation until the day of the hearing (id. at 53-54, citing Tr. 17, at 2727).

assumptions, after correcting Cablevision's errors, the valuation drops to between \$7.0 and \$12.0 million, consistent with the negotiated \$11.6 million valuation (BECo Initial Brief at 62-63, citing Exhs. BEC-RSH-26, at 18; BEC-RSH-27).

With respect to Cablevision's lit fiber analysis, BECo argues that the analysis (1) ignores the fact that there are no customers (other than BECo, which has its own fibers) at each of BECo's transmission substations; and (2) underestimates annual expenses associated with the communications business, such as general and administrative ("G&A") expenses, O&M expense, and property taxes (BECo Initial Brief at 61, citing Exh. BE-RSH-26, at 17). Finally, BECo distinguishes Cablevision's examples of utilities or public agencies that have provided ROWs, fiber use or other communication-related services or facilities (id. at 63, citing Exh. BE-JEA-1, at 12). BECo asserts that beyond the flaws in Cablevision's analysis, nothing demonstrates the unrealistic nature of these values more than the fact that BECo could not find any buyers at prices even close to the levels determined by the analysis (id. at 64, citing Exh. BE-RSH-26, at 113).

With respect to the Attorney General's valuation, the Company contends that the MCIMetro agreement is fundamentally different than the Joint Venture. BECo argues that (1) the fiber involved in the MCIMetro transaction does not follow the same route as the fiber backbone acquired by BecoCom, a difference that would affect the lease price; (2) the MCIMetro lease price incorporates many costs that are priced separately for BecoCom's fiber backbone, such as ROW fees, G&A expenses, O&M expenses, and property taxes; and (3) the Attorney General fails to recognize that the greater "per fiber" content of the system in use by

BecoCom means a lower per-unit price than the 12-fiber MCIMetro system (BECo Reply Brief at 34-35).

4. <u>Analysis and Findings</u>

In order to evaluate the Company's treatment of its fiber optic network, the Department must establish: (1) whether the fiber swap constituted a <u>bona fide</u> transaction; (2) whether Department approval of the fiber swap was required; (3) the utility or non-utility status of the fiber optic network; and (4) the appropriate valuation of the transferred assets, taking into consideration both the 1997 Electric Restructuring Act and the Department's own Standards of Conduct.

Concerning the question of whether the BECo-BecoCom fiber swap was a genuine transaction, the Company clearly had excess capacity in its pre-1996 construction. This excess capacity was indicative of then-current fiber optic technology, such as the perceived need for system redundancy and the larger-capacity fiber optic wires that manufacturers began producing over time (Exh. BE-JEA-1, at 22; Tr. 1, at 66). Later developments in the fiber optic industry made it possible to carry more data on fewer strands, with no significant increase in cable costs (Exh. BE-JEA-1, at 21-22). While Cablevision and BECo differ on the reasons behind the installation of a fiber optic system with excess capacity, no party has challenged the prudence of BECo's decision to construct a fiber optic network that ultimately had greater capacity than was found necessary to meet its utility-related needs. 43

Issues related to the prudence of BECo's fiber optic network are beyond the scope of this proceeding; the matter is more appropriately examined in the context of a rate (continued...)

Faced with the question of how to use this excess fiber capacity, the Company initially considered potential non-utility uses in August of 1994, as evidenced by a marketing memorandum which ultimately led to the commissioning of the JTM Study in December 1994 (Exh. AG-RSH-10; Tr. 18, at 3035-3036). 44 The potential benefits of a fiber optic network used for non-utility purposes were the subject of discussion by the Company's Board of Directors as part of BECo's 1996 capital plan (Tr. 23, at 3609-3610). Contrary to the Intervenors' allegations, the June 30, 1997 memorandum is not the first time a BECo-BecoCom fiber swap is discussed (Exh. CSC-RSH-43). The fiber swap was internally approved and implemented during the first quarter of 1997, with additional construction necessary to complete the swap⁴⁵ (DTE-RR-1). The June 30th Memorandum states that, with the advent of the Joint Venture, the time had arrived to begin the necessary transactions to formally complete the fiber swap, which had been formally executed in June 1997 with the signing of the Joint Venture documents (Exh. CSC-RSH-43; DTE-RR-1). A fiber swap had been the subject of ongoing discussions between BECo and BecoCom, had been agreed upon in early 1997, was formally consummated in June 1997, and technically implemented upon the completion and splicing of

^{43 (...}continued) proceeding brought under G.L. c. 164, § 94. See Western Massachusetts Electric Company, D.P.U. 85-270, at 25-27 (1986).

While a 1986 study prepared by Coopers & Lybrand alluded to the potential revenue opportunities afforded by the Company's internal telecommunications network, BECo did not consider the issue further at that time (Exh. BE-JEA-1, at 23-25).

Additionally, the Company did engage in a 1993 fiber capacity swap with MFS (CSC-RR-1; DTE-RR-1). Therefore, it is reasonable to conclude or at least to assume that BECo was familiar with a fiber swap option, and was aware of its application in the potential non-utility use of the fiber optic network.

the two networks (Tr. 1, at 177-78; Tr. 2, at 349). Accordingly, the Department finds that the BECo/BecoCom fiber swap was not an after-the-fact transaction intended to mask an inappropriate diversion of utility assets, but the culmination of an evaluation of BECo's fiber needs for both regulated and unregulated ventures. Therefore, the Department finds that the BECo/BecoCom fiber swap was a bona fide transaction.

Concerning the issue of whether Department approval of the BECo-BecoCom fiber swap was necessary, there was no exchange of money or title to the assets involved in the exchange, and BECo retains ownership and control over the fiber optic network (Tr. 1, at 64; DTE-RR-9). The agreement between BECo and BecoCom merely set forth various rights to use their respective fiber optic systems. Assignment of utility assets to non-utility operations is a common industry practice (Exh. MEB-1, at 5; see also Cambridge Electric Light Company, D.P.U. 92-250, at 8-13 (1993); Berkshire Gas Company, D.P.U. 90-121, at 20-50 (1990); Boston Edison Company, D.P.U. 906, at 27-29 (1982)). These transactions do not customarily require prior approval, and are typically examined on an after-the-fact basis in a § 94 proceeding to determine their appropriate ratemaking treatment. Commonwealth Electric

Because it is documented that a fiber swap had been among the issues discussed by the settling parties in D.P.U. 96-23, the Company's restructuring proceedings (Exh. AG-RSH-23, at 31-32), this discussion constitutes an independent fact subject to Department inquiry, and not an admission as to the validity of any claims set forth by the settling parties in D.P.U. 96-23. See Fitchburg Gas and Electric Light Company, D.T.E. 99-66-A at 5-6 (2001). However, the Department does not accord any evidentiary value to either draft settlement documents or positions taken during settlement negotiations. New England Electric System/Eastern Utilities Associates Merger, D.T.E. 99-47, at 71-74 (2000); Massachusetts-American Water Company, D.P.U. 95-118, at 138-139 (1996); Boston Gas Company, D.P.U. 88-67, Phase One at 15-25 (1988).

Company, D.P.U. 88-135/151, at 92 (1989); <u>Boston Gas Company</u>, D.P.U. 1100, at 62-65 (1982). However, the propriety of an asset transfer or swap may warrant later investigation if the Department becomes aware of facts that support the need for further inquiry. <u>Wannacomet Water Company</u>, D.P.U. 87-91/87-98 (1987).

In this case, allegations of an inappropriate diversion of utility assets to non-utility operations have been made by the Intervenors, and fully examined by the Department. As an initial matter, BECo granted its non-utility operations the right to use 552 fiber-miles of pre-1996 fiber optic construction that was deemed not required for electric operations, in exchange for a right to use 888 fiber-miles of post-1995 fiber optic construction, at no additional cost to the Company (Exhs. BE-RSH-1, at 14; BE-RSH-9). Although the Attorney General questions whether the fiber-miles exchanged were of comparable value, no party has disputed that the exchange resulted in a complete fiber optic network which was used and useful in providing service to ratepayers. Regardless of whatever value may be ascribed to an asset, its value to ratepayers is negligible -- or at least limited -- if it is unable to meet a utility's objective to provide reliable service. Moreover, examination of the actual fiber-miles involved in the transaction demonstrate that BECo granted its non-utility operations the right to use 60 fiber-miles in dense urban areas and 456 fiber-miles in suburban areas, in exchange for the right to use, for utility purposes, 276 fiber-miles in very dense urban areas, 114 fiber-miles in dense urban areas, and 498 fiber-miles in suburban areas (Exh. BE-RSH-9). Considering the relative value of fiber-optic networks in urban versus suburban areas, the Department considers that the Company's utility operations were the beneficiary of the transaction, which redounds to

ratepayers. Based on the foregoing analysis, the Department concludes that the transfer did not represent an inappropriate diversion of utility assets to non-utility operations.

The Department now examines the appropriate ratemaking treatment of the transferred fiber optic network. Concerning the accounting treatment of the post-1995 fiber optic construction, the plant constructed in 1996 had been initially booked primarily to Account 353, Station Equipment, Account 356, Overhead Conductors and Devices, and Account 397, Communications Equipment (Exhs. BE-MFF-1, at 12; AG-MFF-3; CSC-MFF-1). While these accounts refer to plant associated with transmission purposes (Accounts 353 and 356) and general utility operations (Account 397), examination of the capital authorization budgets demonstrates that the post-1995 fiber optic system had both utility-related value and excess capacity that was recognized as potentially meeting the needs of future unregulated ventures (Exhs. BE-RSH-8; BE-MEB-1, at 6). This is further evidenced by the fact that the Company only uses twelve percent of the post-1995 fiber optic construction for utility purposes (Exh. BE-MEB-1, at 7). On this basis, the Department concludes that the post-1995 fiber optic construction had both utility and non-utility applications.

The Intervenors have emphasized the applicability of the USOA for Electric Companies in determining the appropriate classification of the fiber optic system. They seem to suggest that the accounting treatment is something like the functional equivalent of an express or implied admission of a party opponent. See, e.g., Proposed Mass. R Evid. and Fed R. Evidence No. 801(a)(2); McNicholas v. New England Telephone and Telegraph Co., 196 Mass. 138, 142 (1907). The Department, however, previously has found that financial accounting standards do

not automatically dictate ratemaking treatment. <u>Massachusetts-American Water Company</u>, D.P.U. 95-118, at 107; NYNEX Price Cap, D.P.U. 94-50, at 305; Massachusetts Electric Company, D.P.U. 92-78, at 79-80 (1992). The Department's USOA for Electric Companies, 220 C.M.R. § 51.00 et seq., represents a system whereby costs are sorted and categorized to provide the Department with information on utility operations and aid in the review of utility costs; they do not establish either the reasonableness <u>per se</u> of the reported costs or the ratemaking treatment to be accorded to such costs. Because the ratemaking process takes into consideration many factors other than account balances, the fact that the Department's system of accounts contains a particular category of cost implies no judgment as to the reasonableness of that cost in a given instance. See Reclassification of Accounts of Gas and Electric Companies, D.P.U. 4240-A, Introductory Letter (May 19, 1941); see also Boston Gas Company v. City of Newton, 425 Mass. 697, 706 (1997) (the booking of a particular expense in accordance with the Department's USOA for Gas Companies does not establish the reasonableness per se of that expense for ratemaking purposes). Thus, while financing accounting practices and our accounting regulations are important and may be some evidence of a company's intentions contemporaneous with the booking entry, they are not dispositive of ratemaking treatment. In any event, as one of Cablevision's witnesses recognized, an asset cannot be accorded rate base treatment merely by booking the item to an account that represents one of the components used in determining a utility's rate base (Tr. 18, at 2989). Otherwise, companies would have a perverse incentive to "game" their accounting practices to maximize their revenue

requirements, in violation of both well-established Department standards and generally accepted accounting principles.

Based on BECo's expressed intent to use some portion of the fiber optic system for non-utility use as described in the capital authorization reports, the magnitude of capacity being installed in comparison to the 12-strand needs associated with electric operations, and the inchoate state of the future role excess fiber optics, the Department concludes that the 1996 fiber optic construction should not have been booked exclusively to utility plant in service accounts.

Companies are under an obligation to ensure that their accounting records are accurate, and to correct any errors that are found. When accounting errors have been identified, the Department has directed those companies to make the appropriate corrections. Colonial Gas Company, D.T.E. 98-128, at 49, n.33 (1999); Assabet Water Company, D.P.U. 95-92, at 5-9 (1996); Witches Brook Water Company, D.P.U. 92-226, at 14 (1993). Accounting errors are not uncommon.⁴⁷ In this case, BECo voluntarily reclassified its fiber optic investment upon its reexamination of the applications that the network would have in the overall operations of the Company (Exh. CSC-MFF-40). The Department finds the January 1997 reclassification of the 1996 fiber optic construction from utility plant accounts to Account 186 appropriate as part of the Company's ongoing obligation to ensure that its accounting records conform to Department

In so saying, we do not disprize the importance of accounting accuracy to transparency of corporate transactions or to effective regulation. As has recently been noted, "[a]ccounting irregularities, however modest, are often the miner's canary." "Enron's Fall, Upended," <u>The Economist</u>, 1 December 2001, at 65.

requirements and generally accepted accounting principles.⁴⁸ The Department also finds that the Company's decision in late 1997 to reclassify the fiber optic investment from Account 186 to Account 123 was consistent with both the Department's accounting principles and the evolving role BECo saw its fiber optic system playing in the operations of the Company.

Having addressed the accounting treatment of the fiber optic construction, we now turn to the issue of the value of the fiber optic network that was contributed to the Joint Venture. The Department has reviewed the construction value ascribed by Cablevision as well as BECo's valuation of \$6.9 million. The source of Cablevision's valuation is derived from a proposed BECo-RCN meeting agenda, dated February 26, 1997, and appears to have been a preliminary number that the Company used in its negotiations with RCN (Exh. CSC-RSH-36 (Confidential)). The proposed valuation includes direct and indirect construction costs, general and administrative costs, overhead and AFUDC, along with substation space (id.). The differences between Cablevision's and the Company's valuations are attributable to (1) the exclusion of substation space from the transferred asset valuation; (2) the use of a different overhead rate based on 1996 distribution experience; and (3) a detailed review of 1996 charges to fiber optic capital authorizations which would not have been available in February 1997 (id.; Exh. AG-MFF-5).

A reading of the USOA for Electric Companies, 220 C.M.R. § 51.00 et seq., suggests that it may have been more appropriate to book the 1996 construction to Account 106, Completed Construction Not Classified, pending a final allocation between utility and non-utility purposes. However, this difference in journal entries does not affect our analysis.

As noted in Section II.E.1, above, the costs associated with the 150 square feet at each of some 24 substations along the fiber optic route have been incorporated into the ROW fees paid to BECo by BecoCom (Exhs. BE-RSH-7 (Licence Agreement), at 153, 157; AG-RSH-1, at 18; Tr. 3, at 514-516). There is no evidence to suggest that ROW fees calculated in Exhibit BE-RSH-12 and paid by BecoCom fail to cover the costs associated with the use of the Company's transmission station space. Moreover, the Department has considered the Company's revised overhead rates and fiber optic capital authorization charges (Exhs. CSC-RSH-36 (Confidential); AG-MFF-5). The revised overhead rate was based on BECo's actual distribution experience during 1996, and a detailed review of the Company's capital authorization charges for 1996 would not have been available when the BECo-RCN meeting agenda was prepared in February of 1997 (Exhs. CSC-RSH-36 (Confidential); AG-MFF-5). The Department finds that the revised overhead rates and capital authorizations represent valid updates to the information originally relied upon by the Company in its negotiations with RCN. In view of the difference between the valuation approach that BECo initially ascribed to its fiber-optic assets, and the assets that ultimately became the subject of the Licence Agreement, the Department finds that the construction cost claimed by Cablevision is not comparable to the actual assets that were transferred to BecoCom. Accordingly, the Department declines to adopt Cablevision's proposed valuation.

The Intervenors contend that a fair market valuation of the transferred fiber optic system was required to meet the mitigation provisions of the 1997 Electric Restructuring Act. As an initial matter, BECo transferred most of the fiber optic network at issue here, <u>i.e.</u>, \$5,697,672,

to non-utility plant during September and October 1997 (Exh. AG-MFF-5; Tr. 15, at 2475-76). The 1997 Electric Restructuring Act became effective on November 25, 1997. Therefore, these fiber optic asset transfers predated the 1997 Electric Restructuring Act and, consequently, cannot be evaluated in the light of a statute that did not even exist during the period that the transfers were made.

With respect to the remaining \$1,244,033 in fiber optic assets, these assets were transferred in December 1997, after implementation of the 1997 Electric Restructuring Act (Exh. AG-MFF-5; Tr. 15, at 2475-2476). General Laws c. 164, § 1 defines mitigation, in relevant part, as including "any market value in excess of net book value associated with the sale, lease, transfer, or other use of the assets of the company unrelated to the provision of transmission service or distribution service at regulated prices, including, but not limited to, ROWs, property, and intangible assets when the costs associated with the acquisition of those assets have been reflected in the company's rates for regulated service," at Department-determined market values that could be reasonably obtained through an open and competitive sale. This language leads us to conclude that mitigation is intended to be confined to those utility operations other than transmission or distribution where the costs of those operations were included in the utility's regulated rates. See Boston Edison Company, D.P.U./D.T.E. 97-63, at 39-40. The post-1995 fiber optics have never been included in the Company's regulated rates, because BECo's last base rate proceeding was <u>Boston Edison</u> Company, D.P.U. 92-92 (1992). Under the Intervenors' interpretation, BECo would have been compelled to divest its interest in BETG and confine itself to a "wires-only" business.

This extreme interpretation is unfounded and unsupported in statute. Accordingly, the Department finds that the 1997 Electric Restructuring Act is not implicated here.

The Intervenors also argue that a fair market valuation is required under the Department's Standards of Conduct, 220 C.M.R. §§ 12.00 et seq. Under the Standards of Conduct, a distribution company may sell, lease, or transfer to an affiliate an asset whose costs have been "reflected in the [d]istribution [c]ompany's rates for regulated service, provided that the affiliate is charged the higher of the net book value or market value of the asset." 220 C.M.R. § 12.04(1). A distribution company is also permitted to sell, lease, or transfer to an affiliate assets other than those provided for in 220 C.M.R. § 12.04(1), provided that the price charged for the asset is equal to or greater than the distribution company's fully allocated cost to provide the asset. 220 C.M.R. § 12.04(2).

As an initial matter, 220 C.M.R. §§ 12.00 et seq. was promulgated in May 1998.

Standards of Conduct Rulemaking, D.P.U./D.T.E. 97-96. However, the Company transferred the fiber optic assets to non-utility plant accounts between September and December 1997, thus predating 220 C.M.R. § 12.00 et seq. Therefore, the Standards of Conduct prescribed in D.P.U./D.T.E. 97-96 do not apply here. Even assuming that the Department's Standards of Conduct applied in this case, the Department has noted above that the Company's last base rate proceeding was decided in 1992. Boston Edison Company, D.P.U. 92-92. Insofar as the fiber optic assets that were transferred to BecoCom were originally constructed in 1996, and thus

The standards promulgated in <u>Standards of Conduct Rulemaking</u>, D.P.U. 96-44 (1996) would not apply here either, because these standards only addressed issues between distribution companies and their marketing affiliates.

could not have been included in the Company's regulated cost-of-service-based rates, the Department finds that the provisions of 220 C.M.R. § 12.04(1) do not apply. Under 220 C.M.R. § 12.04(2), a company may sell, lease or transfer assets not included in regulated rates to a utility at fully-embedded costs. See Commonwealth Electric Company, D.P.U. 88-135/151, at 92-94 (1989); see also Barnstable Water Company, D.P.U. 93-223-B at 12-14 (1994). Because the Company transferred the fiber optic assets to BecoCom at their original book value of approximately \$6.9 million, the Department finds that the BECo-BecoCom transfer would have complied with the requirements of 220 C.M.R. § 12.04(2).

Regardless of whether the Company's fiber optic system should have been transferred to BecoCom at book or market value, the key issue in this proceeding is the valuation of these assets for purposes of G.L. c. 164, § 17A. The intent of § 17A is to protect ratepayers by assuring a utility's stable financial condition. See Bay State Gas Company, D.P.U. 91-165, at 7 (1992); see also Boston Edison Company, D.P.U. 850 (1983). Under the theory of historical cost rate base relied upon by the Department since the inception of rate regulation, ratepayers are only exposed to risk associated with plant investment in an amount equal to the original cost of the plant investment, not some representation of what the market price may be from time to time. Millbury Water Company, D.P.U. 4932, at 4 (1935). For purposes of § 17A, the market value of transferred assets is irrelevant; otherwise, the Department would need to continuously monitor the market valuation of assets, amending any non-cash § 17A approvals on a constant basis depending on market conditions. No party has cited and the Department is not aware of any § 17A proceeding where the amount of the investment or

guarantee was a function of market values. Additionally, in D.P.U. 93-37, at 17, the Department determined that the \$45 million investment authorization sought by BECo was equal to 4.3 percent of the Company's total book equity.⁵⁰ Permitting utilities to base their investment decisions on what percentage of a proposed investment represents on total market valuation would actually frustrate the intent of § 17A by allowing escalating investments to be made regardless of the effect on the regulated utility's operations.

Additionally, G.L. c. 164, § 94C provides some guidance on the appropriate valuation of the fiber optic network. This statute provides that, for purposes of determining the value of an investment in an affiliated company as defined by G.L. c. 164, § 85, in any proceedings under §§ 14, 92, 92A, 93, 94, 94A or 94B,⁵¹ the valuation shall be the lesser of the actual cost of the investment or the net original cost of the property of the affiliate. Under the definition of an affiliate provided in § 85, BecoCom is an affiliate of BECo. Therefore, in any proceedings brought under the above-cited sections of G.L. c. 164, the Company's investment in BecoCom would be evaluated at the lesser of the actual cost of the investment or the net original cost of the property.

This is mathematically demonstrated by dividing \$45 million by .043, which produces \$1,046,511,627. This result is consistent with BECo's book equity of over one billion dollars which existed at the time the Department established the \$45 million investment cap (Exh. JEA-1, at 68). Therefore, the Department is satisfied that the reference in D.P.U. 93-37 to the Company's total equity pertains to book, rather than market, equity.

Proceedings under these statutes involve financing petitions (§ 14), denial of service (§§ 92 and 92A), rate investigations (§§ 93 and 94), and contracts with affiliated companies (§§ 94A and 94B). The sections are <u>in pari materia</u> with § 17A and are therefore helpful to our analysis of that rather general statute.

Under principles of statutory construction, statutes addressing the same subject matter are ordinarily construed to be consistent with one another, such that effect is given to every provision therein. See 2B Singer, Sutherland Statutory Construction § 51.02, at 189 (6th ed. 2000); see also Green v. Wyman-Gordon Co., 422 Mass. 551, 554 (1996); St. Germaine v. Pendergast, 411 Mass. 615, 626 (1992). In applying this principle to G.L. c. 164, §§ 17A and 94C, we note that both statutes are of general application and both address a similar subject matter, i.e., the valuation of investments in affiliated companies. Therefore, the Department is required to construe them both collectively and with consideration of each provision therein, such that a harmonious result consistent with the legislative purpose is achieved without rendering any part of the statutes meaningless. Applying the definition provided in § 94C to the purpose of § 17A, the Department finds that the definition of valuation found in § 94C is applicable to evaluations of investments sought under § 17A. Therefore, the Department finds that the Company's investment in BecoCom should be measured, for purposes of § 17A, at book value.

Turning to the issue of the appropriate valuation of the Company's ROWs, the License Agreement transfers to BecoCom the right to use certain ROWs and to right to install, maintain and operate new fiber optic facilities in BECo's ROWs (Exh. BE-RSH-7, at 153). As with the value of Company's transmission space used by the Joint Venture, the value of these rights has been incorporated into the ROW fees paid to BECo by BecoCom (Exh. AG-RSH-1, at 18; Tr. 3, at 514-516). The ROW fees paid to BECo by BecoCom are based on the fully-allocated costs, similar to how pole attachment fees are calculated, and not on the market value of the

ROW (Exh. BE-RSH-12, Atts. 2, 3). Although the Intervenors argue that the use of these ROWs by the Joint Venture represent a significant benefit to the Joint Venture's participants, there is insufficient evidence in the record to determine that the presence of only one optical ground wire along the transmission network precludes access by other entities (Exh. BE-RSH-1, at 6). Cablevision's own witness expressed uncertainty as to whether other kinds of fiber optic cable could be strung on transmission towers (Tr. 17, at 2832-33). Moreover, there is no evidence that third parties are seeking access to the Company's power space on the Company's distribution poles (Exhs. BE-RSH-1, at 12, 38-39; DTE-RSH-1). Therefore, we conclude that the ROW fees are appropriately based on the fully-allocated costs of the distribution and transmission systems. Accordingly, the Department shall not include the market value of the Company's ROWs in the calculation of BECo's investment in BETG.

The Company reported that it contributed \$6,935,345 in non-cash fixed assets to BETG, all of which were invested in BecoCom (Exhs. BE-MFF-1, at 10; BE-MFF-2; BE-MFF-9). The Department has examined the Company's workorder reports related to the construction of the fiber optic network, as well as the journal entries and supporting memoranda related to the transfer of fiber optic assets to BETG (Exhs. AG-MFF-5; DTE-MFF-4 (Confidential)). Based on the journal entries and supporting memoranda, the weight of the evidence shows that the Company transferred \$6,941,705 of fiber optic network and other assets to BecoCom. ⁵²

The difference of \$6,360 is consistent with an entry found in Workorder 3244454; the Company indicated that a small portion of the total assets transferred to BETG were not related to the fiber optic network (Exhs. DTE-MFF-4, Capital Authorization 95-231 (Confidential); BE-MFF-1, at 4). The Department has included this item in the total (continued...)

Accordingly, the Department finds that the value of the fiber optic network and related assets invested by the Company in BecoCom, by way of BETG, is \$6,941,705.⁵³

F. <u>Conclusion</u>

Concerning the scope of BETG's authority, the Department finds that the mere nature of BECo's investment in activities other than those specifically instanced in D.P.U. 93-37 did not violate the provisions of D.P.U. 93-37. Concerning the cash investment in BETG, the Department has included \$3,272,450 in unpaid invoices and \$392,694 in accumulated interest that must be added to the \$25,200,000 cash investment made by BECo in BETG. Concerning the fiber optic plant transferred to BETG, the Department finds that the post-1995 fiber optic network is non-utility plant, and that a book value of \$6,941,705 shall be used to determine the Company's investment in BETG for purposes of G.L. c. 164, § 17A. Concerning the value of BECo's guarantees entered into on behalf of BETG and its subsidiaries, the Department finds that the guarantees shall be valued at their face value of \$13,160,642, and that the \$30 million BankBoston support agreement shall be excluded from the investment balance.

^{(...}continued)assets transferred to BETG.

Examination of the pre-1996 and post-1995 fiber optic construction and BECo/BecoCom fiber swap indicates that as much as 552 fiber-miles of fiber optic network installed prior to 1996 is being used by the Joint Venture. For the reasons stated above, the Department has valued this investment at book value for purposes of § 17A. The ratemaking treatment of this fiber optic network, including consideration of potential gains to BECo arising from the use of utility assets by the Joint Venture, will be appropriately considered in the context of a rate case brought under G.L. c. 164, § 94. Boston Edison Company/Boston Edison Mergeco Electric Company, D.P.U./D.T.E. 97-63, at 32-33, 36.

Based on the foregoing, the Department finds that BECo did, however, exceed the \$45 million cap established in D.P.U. 93-37 by \$3,936,881, as illustrated below:

Cash	\$25,169,390
Unpaid Invoices	3,272,450
Accumulated Interest	392,694
Fiber Optic Network/Other Assets	6,941,705
Guarantees	13,160,642
	\$48,936,881
Less: Authorized Level	45,000,000
Excess Investment	3,936,881

Thus, we conclude that BECo violated the Department's Order in D.P.U. 93-37. BECo exceeded the \$45 million cap on investment in BETG imposed on it by the terms of the settlement approved in D.P.U. 93-37. We further find, therefore, that this excess investment represents a violation of G.L. c. 164, § 17A. Specifically, BECo violated § 17A by investing more than its authorized level of funds in a corporation without the Department's approval, in the form of unpaid invoices, interest, and guarantees provided to Unicom and Willliams. Although this statute sets forth civil and criminal penalties for violations, § 17A does not specify any grant of special enforcement authority. Despite this lack of express legislative grant of enforcement means, the Department is nonetheless obligated to take corrective measures to ensure that BECo returns to compliance with both § 17A and the terms of the

General Laws c. 164, § 17A provides that a director, treasurer or other officer or agent of a gas or electric company who makes a loan, guarantee, or endorsement in violation of this statute shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than one year, or both. It appears that these are personal rather than corporate sanctions (one cannot, after all, imprison a corporation); but the instant record does not seem to support their imposition. Nor is it obvious how the Department would levy such fines or impose such sentences. These powers lie elsewhere.

settlement approved in D.P.U. 93-37. Failure to do so would not meet the legislative intent of § 17A. See 2B Singer, Sutherland Statutory Construction § 51.02, at 189 (6th ed. 2000). Therefore, we look to both our general supervisory authority granted pursuant to G.L. c. 164, § 76, and our jurisdiction over utility accounting practices pursuant to G.L. c. 164, § 81, to fashion a solution.

The Intervenors have proposed a number of possible sanctions against BECo, including (1) the forced divestiture of the Company's interest in the Joint Venture, crediting all realized gains to ratepayers; (2) permitting BECo to remain in the Joint Venture, but crediting the difference between the book and fair market values of the transferred assets to the Company's ratepayers; and (3) applying the difference between the book and market values of the transferred assets to offset stranded costs, in conjunction with a refund of all of the Company's share of revenues earned from the Joint Venture. Some of these proposals are extreme and, more importantly, are either beyond the Department's jurisdiction or are disproportionate to the harm -- or, more to the point, the potential for harm -- arising from BECo's actions. Other proposed sanctions, involving the purported gain on the asset transfers, are inconsistent with our findings that the transferred assets properly constitute non-utility assets for purposes of our review under § 17A. We consider that it is appropriate to try to fashion a remedy that is both proportional to the violation and designed to match the harm or potential harm caused by the violation.

In order to determine the appropriate means of compensation, we turn to the underlying purposes of § 17A for guidance. G.L. c. 164, § 17A provides:

No gas or electric company shall, except in accordance with such rules and regulations as the [D]epartment shall from time to time prescribe, loan its funds to, guarantee or endorse the indebtedness of, or invest its funds in the stock, bonds, certificates of participation or other securities of, any corporation, association or trust unless the said loan, guaranty or endorsement, or investment is approved in writing by the [D]epartment.

D.P.U. 93-37, at 12, notes that "no explicit standard of review is provided by G.L. c. 164, § 17A, or in a judicial or administrative construction of the statute." However, the Department "has recognized that the primary purpose of § 17A is to protect ratepayers by assuring a utility's stable financial condition." In D.P.U. 93-37, at 14, the Department also found that

consistent with the <u>Bay State II</u>[56] analysis, and with the protection of the public interest under Section 17A, . . . it is appropriate to examine the following factors when a utility proposes to invest in a subsidiary under Section 17A:

- (1) the nexus between the proposed subsidiary and the company's core business;
- (2) the company's proposed investment and its total investment in subsidiaries as a percentage of the company's total equity; and (3) the methods employed in the accounting system to protect the utility's ratepayers from cross-subsidization of a proposed subsidiary by the utility.

Our standard of review has evolved since then. In <u>Massachusetts-American Water</u>

<u>Company/Salisbury Water Supply Company</u>, D.T.E. 00-43, at 5 (2000), for example, we explained that a petitioner under G.L. c. 164, § 17A must demonstrate that its proposal is "consistent with the public interest," that is, a § 17A proposal will be approved if the public interest is at least as well served by approval of the proposal as by its denial.⁵⁷ <u>Bay State Gas</u>

This purpose is founded in the intent behind St. 1954, c. 95, § 1, which expanded the application of G.L. c. 164, § 17A to include investments in stocks or securities of other companies. See House Document No. 53, at 2 (1954).

Bay State Gas Company, D.P.U. 91-165 (1992).

The Department has applied this standard of review to any petition filed under § 17A, (continued...)

Company, D.P.U. 91-165, at 7 (1992); see Boston Edison Company, D.P.U. 850 (1983). The Department will interpret the facts of each § 17A case on its own merits to make a determination that the proposal is consistent with the public interest. D.P.U. 91-165, at 7. The Department will base its determination on the totality of what can be achieved rather than a determination of any single gain that could be derived from the proposed transactions. Id.; see D.P.U. 850, at 7. The Department has found that the consistency standard best accommodates the Department's interest in protecting the utility's ratepayers from the adverse effects of unwarranted § 17A transactions and a utility's interest in having flexibility in a changing marketplace to meet long term objectives of its ratepayers and shareholders. D.P.U. 91-165, at 7; Boston Edison Company, D.P.U. 97-17, at 6 (1997).

As we stated earlier, the Department's analysis must consider the overall anticipated effect on ratepayers of the potential harms and benefits of the proposal. D.P.U. 91-165, at 8. The effect on ratepayers may include consideration of a number of factors, including, but not limited to, the nature and complexity of the proposal; the relationship of the parties involved in the underlying transaction; the use of funds associated with the proposal; the risks and uncertainties associated with the proposal; the extent of regulatory oversight on the parties involved in the underlying transaction; and the existence of safeguards to ensure the financial stability of the utility. <u>Id.</u>

^{57 (...}continued) whether the petitioner was seeking to loan money, guarantee indebtedness, or invest in other companies, including affiliates. See D.T.E. 00-43, at 5-6; Western Massachusetts Electric Company, D.P.U. 97-13, at 11 (1997).

Exposing ratepayers to risk of harm, unsanctioned by the regulator, is harmful <u>per se</u> and thereby violates § 17A. Investment caps, such as the cap approved by the Department in D.P.U. 93-37, are regulatory tools for limiting ratepayers' risk from investments outside the provision of utility services. All investments carry some risk, but specifying a cap on particular types of investments reduces the probability that a failed investment will raise a utility's cost of capital or harm a utility's ability to maintain its infrastructure and thereby jeopardize service quality and cost to ratepayers. When an investment cap is violated, ratepayers are subject to a level of risk that exceeds what the regulator has determined to be consistent with avoidance of risk of harm to ratepayers. An appropriate remedy then is to match the Company's sanction to the level of risk of or actual harm to which ratepayers were exposed. As explained below, we find that returning the excess investment to BECo from BETG and then crediting to ratepayers the return the Company would have earned on that excess investment is an appropriate remedy because it proportions the sanction to the risk of harm.

Generally accepted accounting principles make it clear that, as BECo was the entity that contributed the overfunding to BETG, the Company is the entity to whom any over-contribution should be returned. While BETG is no longer a subsidiary of the Company as a result of the creation of BEC Energy in 1998, BECo and BETG are wholly-owned subsidiaries of NStar, with BEC Energy operating as an interim subholding company. BEC Energy Company/ComEnergy Acquisition, D.T.E. 99-19, at 4. The Company's parent, NStar, is an "affiliated company" in relation to BECo, as defined by G.L. c. 164, § 85, and as such is subject to the jurisdiction of the Department with regard to NStar's relations,

transactions, and dealings with BECo. G.L. c. 164, § 76A. Consequently, NStar is ultimately responsible for ensuring that its wholly-owned regulated subsidiary complies with Department directives. Therefore, pursuant to G.L. c. 164, §§ 76, 76A, and 81, the Company is directed to take all measures necessary to receive reimbursement from BETG, either directly or through NStar, of \$3,936,881. The source or sources of this reimbursement may be in the form of cash or non-cash assets, with the precise determination left to the discretion of the Company's management, provided the valuations of non-cash assets are fairly arrived at. The Company shall file with the Department confirmation that the reimbursement had been received from BETG, along with the required journal entries, within 30 days from the date of this Order.

While this reimbursement will restore BECo's financial books to a state approximating the one it would have been in had the Company remained in compliance with the terms of D.P.U. 93-37, our obligations to the ratepayer are not confined to accounting considerations. Because the Company's overinvestment (i.e., in excess of the amount approved in D.P.U. 93-37) in BETG, a subsidiary carrying greater business risk, did reduce the Company's common equity by a small amount, ratepayers were placed at greater, albeit marginally greater, risk.

In order to fully compensate ratepayers for this increased risk, BECo is directed to return to ratepayers the carrying charges associated with the over-investment in BETG. In determining the amount to be returned to ratepayers, the Department considers that the Company's overinvestment in BETG reduced the amount of capital available for regulated utility operations by \$3,936,881. This shortfall would have required the Company to access a

variety of sources, including internally generated funds, retained earnings, or short-term borrowings, to meet the needs of its utility operations. Long-standing Department practice has been to allow a company to collect revenues corresponding to a representative level of costs associated with the use of its funds or of the interest expense incurred in financing short-term borrowings for working capital requirements. <u>Boston Gas Company</u>, D.P.U. 88-67, Phase One at 32. As a measure of the cost of capital that would have been incurred through the Company's overinvestment in BETG, the Department considers that BECo's weighted cost of capital represents the cost of these sources of capital for which ratepayers compensate a utility through rates. Therefore, the Company shall apply a carrying charge equal to the weighted cost of capital of 10.46 percent.⁵⁸ This 10.46 percent carrying charge shall be applied to the over-investment balance of \$3,936,881 as of December 31, 1997, and compounded monthly over the 48 months that have elapsed between December 31, 1997 and the date of this Order. In the interest of administrative efficiency, the Department orders BECo to return this credit to ratepayers in the form of a credit to the Company's transition cost established under G.L. c. 164, § 1G(b). The credit shall be applied to the variable component of the Company's access charge, and recorded in Column F, "Revenue Credits & Damages, Costs, or Net Recoveries" as found in Exhibit BEC-BKR-1, at 4 submitted as part of the Company's most recent reconciliation adjustment docketed as D.T.E. 01-78.⁵⁹ This credit shall

The weighted cost of capital was determined in <u>Boston Edison Company</u>, D.P.U. 85-266-A/85-271-A at 309 (1986).

This entry was labeled as Column J, "Damages, Costs, or Net Recoveries from Claims" and found in Attachment 3, Schedule 1, at 3 in BECo's restructuring settlement (continued...)

not be eligible for the access charge mitigation incentive provisions of the Company's Restructuring Settlement Agreement.

Turning to the issue of whether BECo's actions have affected competition in the telecommunications and cable industries, we noted in our <u>Order on Burden of Proof</u> at 5 that:

the allegations that prompted investigation of BECo's compliance with D.P.U. 93-37 warranted an examination of the effect that the relationship of BECo, BETG and RCN may have had on competition in the telecommunications and cable industries. Therefore, separate treatment of competition issues in this case is inappropriate. Noncompliance with the Department's Order in D.P.U. 93-37 would have presented an opportunity to affect competition in the telecommunications and cable industries. In other words, if there had been cross-subsidization of BETG and RCN by BECo ratepayers, then by definition there would have been an opportunity for RCN to affect competition in the telecommunications and cable industries. Thus, the scope of this proceeding need only focus on whether BECo has complied with D.P.U. 93-37.

<u>Id.</u> at 7.60

Although we have determined that the Company's ratepayers were harmed by the over-investment in BETG above those levels authorized by D.P.U. 93-37, our enquiry does not end there. We must address whether this overinvestment constituted a cross-subsidy of the Joint Venture. Cross-subsidization may be said to occur when services are sold at a price below incremental cost and these resultant losses are funded by higher rates for monopoly services (Exhs. AEK-1, at 9; BE-MMS-1, at 12). As Dr. Kahn stated:

[P]ricing of competitive services by utility companies at incremental costs reflecting economies of scale or scope emphatically does not constitute

^{(...}continued) agreement approved in D.P.U./D.T.E. 96-23.

As a result of that Order, BECo's request that the Intervenors be required to file a direct case on competition issues was denied. <u>Id.</u> at 7.

cross-subsidization or unfair competition. Success or failure in competition is properly decided by the respective incremental costs of the rivals. It is only when services – whether from the utility companies to their affiliates or in sales to the public by those affiliates – are offered at prices below incremental costs that the competition may be unfair and cross-subsidized at the expense of purchasers of monopoly services. So long as those sales are at or above incremental costs, purchasers of the regulated services cannot be burdened, competitors have no legitimate complaint, and purchasers of the competitive services can only benefit.

(Exh. AEK-1, at 9).

In evaluating BECo's investment in BETG, the Company's cash investment in and receivables from BETG carry, as can be expected, face value. In addition, we valued the guarantees at their face value. The plant investment included in the Joint Venture was non-utility plant⁶¹ that is not subject to the Department's asset transfer policies, and therefore is appropriately valued for purposes of § 17A at book.⁶² The Company's interpretation of its obligations under its guarantees to Unicom and Williams, as well as, to a lesser extent, BECo's treatment of its receivables from BETG, placed the Company in violation of the investment cap. But, both Unicom and Williams are energy companies that are not involved in telecommunications ventures within Massachusetts (Exhs. BE-PAF-17; BE-PAF-25). BECo's violation of D.P.U. 93-37 could not and did not provide an opportunity for BecoCom or RCN to offer their services at prices below incremental cost. Therefore, because the violation of the

As noted in Section II.E.1, above, a small portion of the assets transferred to BETG were not associated with the fiber optic network (Exhs. DTE-MFF-4, Capital Authorization 95-231 (Confidential); BE-MFF-1, at 4).

In contrast, had we found that the fiber optic network was appropriately part of rate base paid for by ratepayers, then a transfer at cost would have been a subsidy to BETG.

investment cap did not result in a subsidy of BecoCom by ratepayers, the violation has had no adverse affect on competition in the telecommunications and cable industries.

III. BECo's RELATIONSHIP WITH BETG AND THE JOINT VENTURE

A. Introduction

Although the primary focus of this investigation is BECo's compliance with D.P.U. 93-37, the Department also considered certain cross-subsidization allegations. In this Section, we discuss all remaining issues related to BECo's relationship with BETG and the Joint Venture. Specifically, we discuss pole attachment issues related to BECo's relationship with the Joint Venture as well as issues concerning the sharing of employees between BECo and BecoCom.

B. <u>Pole Attachment Issues</u>

1. Introduction

Before turning to the allegations raised by the Intervenors, it is helpful to review two recent proceedings concerning pole attachment issues. First, in <u>Boston Edison Company</u>, D.P.U./D.T.E. 97-82, at 46, the Department set new pole attachment rates for BECo and considered other issues such as the reasonableness of certain terms and conditions of the BECo pole attachment aerial licence agreements ("ALA"), specifically, "the terms and conditions surrounding the performance for 'makeready work' and the alleged preferential terms and conditions which BECo afforded its affiliate, [the Joint Venture]. . . ." The Department held that while the terms and conditions of the complainants' license agreements were different from those of BECo's affiliate, the ALAs were the "product of negotiations," and we could not find

that the complainants had been harmed in this regard. <u>Id.</u> at 50. Further, the Department found no evidence that the terms and conditions of makeready work were unreasonable. <u>Id.</u> at 50-51. The Department noted that the complainants were free to bring a complaint pursuant to the pole attachment statute and regulations about a specific instance of intentional delays on the part of BECo.

In a related matter, on July 24, 2000, in D.T.E. 98-36-A, the Department issued an Order establishing complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have non-discriminatory access to poles, ducts, conduits and ROWs (collectively, "pole attachments"). The following sections address two aspects of alleged cross-subsidization activities of BECo related to pole attachments. First, the analysis focuses on issues that pertain to access to the ROWs owned by BECo. Second, we discuss issues that pertain to the terms and conditions under which the Joint Venture and third parties attach to the ROWs owned by BECo.

2. Access Issues

a. <u>"Exclusive" Provisions Within Joint Venture Definitive</u>
Documents⁶³

i. Introduction

The License Agreement between BECo and BecoCom gives BecoCom an exclusive, indefeasible and non-cancelable right of access to and use BECo's ROWs for the purposes of installation and maintenance of certain telecommunication facilities (Exh. BE-RSH-7 (License Agreement) §1.3). The Construction and Indefeasible Right of Use Agreement ("IRU") between BecoCom and the Joint Venture gives the Joint Venture an exclusive, indefeasible and non-cancelable right of access to and use of BECo's ROWs for the purpose of providing the services as defined in the IRU (Exh. BE-RSH-7 (IRU) §5(a)(i)). The IRU also gives the Joint Venture the right of first refusal for access to BECo's ROWs (Exh. BE-RSH-7 (IRU) §5(c)(ii)).

These "Definitive Documents," dated June 17, 1997, were provided in Exhibit BE-RSH-7. These documents include the following: (1) Amended and Restated Operating Agreement of RCN-BecoCom, LLC; (2) Construction and Indefeasible Right of Use Agreement; (3) Management Agreement between RCN Operating Services, Inc. and BecoCom, Inc.; (4) Exchange Agreement between C-TEC and BecoCom; (5) Joint Investment and Non-Competitive Agreement between RCN Telecom Services, BecoCom, and RCN-BecoCom LLC; (6) License Agreement between BECo and BecoCom, Inc.; and (7) Instrument of Adherence.

[&]quot;Services" is defined in the IRU as the Joint Venture's commitment to "(i) create, own and operate a telecommunications network, and (ii) provide voice, video, data and other communications services, and the communications support component of energy-related customer service offered by [BECo], to residential and commercial customers in [the cities and towns referenced in Exhibit B of the IRU]."

regulatory authority. Several parties argue that the exclusivity clauses of these agreements result in a form of cross-subsidization by BECo to the Joint Venture.

ii. Positions of the Parties

(a) NECTA

NECTA claims that the transfer of the installation and maintenance responsibility from BECo to BecoCom is improper because BecoCom does not fall under the Department's direct supervision (NECTA Brief at 46). NECTA argues that such a situation would permit BecoCom to avoid its legal obligation to provide non-discriminatory access under G.L. c. 166, § 25A and 220 C.M.R. § 45.00 (id.).

NECTA argues that the right of first refusal granted to the Joint Venture by BecoCom assures that no third-party has the same prompt access to pole attachments granted to the Joint Venture (id. at 55). NECTA argues that such a provision not only gives the Joint Venture first refusal rights, but further gives the Joint Venture access to specific information on the plans of its competitors and the business terms of their contracts with BecoCom (id.). NECTA claims that BECo is aware that the right of first refusal clause was improper, and, therefore, has never enforced it (id. at 72). Despite BECo's non-enforcement, NECTA states that BECo has not obtained a written waiver from the Joint Venture of this right (id.).

NECTA requests that the Department strike the "illegal" provisions of the License Agreement and the IRU (<u>id.</u> at 88). NECTA also asks the Department to reverse BECo's delegation of its statutory obligation as owner of poles and conduits to BecoCom (<u>id.</u> at 89).

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(b) <u>Cablevision</u>

Cablevision states that the exclusivity clause of the IRU is in violation of 47 U.S.C. § 224(f), which requires that transmission and distribution facilities be made available to CLECs and cable operators on a non-discriminatory basis (Cablevision Brief at 81). Cablevision argues that, unless and until the Department rules that the exclusivity provision is unenforceable, the Joint Venture has a contractual right to enforce it, which could harm competition in the telecommunications market (id. at 82).

Cablevision argues that the right of first refusal provision allows the Joint Venture to prevent its competitors from accessing the power space by taking access when it is requested by a competitor (<u>id.</u>). ⁶⁵ Cablevision also states that this provision requires BecoCom to provide the Joint Venture with competitively sensitive information about its competitors (<u>id.</u>).

Cablevision requests that the Department strike the alleged discriminatory and anti-competitive portions from the IRU (<u>id.</u> at 93-94). In the alternative, Cablevision asks the Department to order BecoCom to divest its interest in the Joint Venture to alleviate this alleged discriminatory and anti-competitive situation (<u>id.</u> at 95).

(c) BECo

BECo states that, pursuant to applicable laws and regulations, the Joint Venture does not have exclusive access to the BECo system, including ROWs, or the power to exclude other

The power space is the area at the top of the pole that is above the safety space. The power space is where all facilities used for the distribution of electricity are located. Although not traditionally used for pole attachments, with certain OSHA-certified employees conducting the installation, this space is available for attachments (Exhs. BE-RSH-2; BE-RSH-3).

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competitors from its system (BECo Initial Brief at 81). BECo claims that there is no disagreement on the effect of the exclusive provisions of the IRU (BECo Reply Brief at 46). BECo states that BECo and BecoCom recognize an obligation to provide non-discriminatory access to the ROWs to any genuine potential competitor in the telecommunications field who is desirous of such access and willing to pay for it (id. at 46-47).

(d) <u>Joint Venture</u>

The Joint Venture claims that an examination of the Joint Venture and the terms and conditions of the Joint Venture's contracts with BECo and BecoCom are beyond the scope of the proceeding (Joint Venture Brief at 11). Thus, the Joint Venture argues that any Department decision on these issues would be a violation of due process, citing G.L. c. 30A, § 11, which states that parties to an adjudicatory proceeding must be provided with sufficient notice of the issues involved (id.).

iii. Analysis and Findings

BECo has certain obligations to provide non-discriminatory access to its pole attachments pursuant to G.L. c. 166, § 25A and 220 C.M.R. § 45.00. See D.T.E. 98-36-A. If the "exclusive" provisions contained within several of the Joint Venture's "Definitive Documents" were enforced, they would violate the Department's non-discriminatory access regulations and an effective cross-subsidy would likely be created between BECo and the Joint Venture. This cross-subsidy would be in the form of a transfer of rights and obligations from BECo to BecoCom and the Joint Venture that could unfairly and illegally bar competitors from access to the BECo system.

However, the "exclusive" provisions contained within the agreements in question clearly state that they are subject to applicable law or regulatory authority. The cable Intervenors have not provided any evidence that these "exclusive" provisions have been applied and have actually resulted in any denial of access by BECo or BecoCom. Instead, BECo testified that BECo and BecoCom recognize the obligation of non-discriminatory access to the ROWs. While it is nowhere documented that the Joint Venture has waived any rights conferred by these "exclusive" provisions, the provisions are unenforceable under state and federal laws and regulations mandating non-discriminatory access to BECo's ROWs. For these reasons, we find that no cross-subsidy exists.

Because the provisions in question are subject to applicable law and regulatory authority, and such law renders the provisions unenforceable, they are nugatory and thus need not need not be stricken from the agreements. In the event of an actual denial of access by BECo or BecoCom, the cable Intervenors may bring a claim pursuant to G.L. c. 166, § 25A and 220 C.M.R. § 45.00, the pole attachment statute and regulations.

b. <u>Construction and Ownership of Facilities in Power Space</u>

i. Introduction

Section three of the IRU designates BecoCom as the only entity that can construct new facilities in the power space (Exh. BE-RSH-7 (IRU) § 3). In addition, the IRU states that BecoCom shall own all such facilities (id.). Issues have been raised regarding access by third parties to the power space. Several parties argue that BecoCom's exclusive right to construct

in the power space and BecoCom's ownership of all facilities constructed in the power space, is a form of cross-subsidization by BECo to the Joint Venture.

ii. <u>Positions of the Parties</u>

(a) NECTA

NECTA argues that BECo's designation of BecoCom as the exclusive construction contractor in the power space is a violation of previous Orders issued by both the Federal Communications Commission ("FCC") and the Department (NECTA Brief at 54, citing Local Competition Order, 11 FCC Rcd. 15499, at ¶ 1182 (1996) and Petition of the Towns of Acton and Lexington, D.T.E. 98-89, at 3 (1998)). NECTA claims that BECo will not allow third-party attachers to construct in the power space, even if the third-party attachers have workers that are OSHA-certified, or if they hire one of BECo's own certified subcontractors (id.). NECTA states that BecoCom's ownership of all facilities constructed in the power space requires third-party attachers to "leaseback" plant in violation of the 1996 Telecommunications Act (id. at 55-56). NECTA argues that the conditions set up by BECo effectively eliminate access to the power space by third parties (id. at 55).

To remedy these alleged violations, NECTA requests that the Department require BecoCom to locate all communications equipment in the communications space on the poles (id. at 82). This proposed remedy would involve the relocation of all facilities that have already been "improperly" built in the power space (id. at 85).

(b) <u>Cablevision</u>

Cablevision argues that the provision of the IRU that allows BecoCom to own all facilities built in the power space results in discriminatory access, since no other party is permitted to construct or own facilities in the power space (Cablevision Brief at 84).

Cablevision argues that BECo's assertion that it will offer other market participants "the same deal" that it offered the Joint Venture for access to the power space is disingenuous since only one party can have "exclusive, indefeasible and non-cancelable right of access and use of" these facilities (in this case, the Joint Venture) (id. at 85).

Cablevision contends that the arrangement permitting only BecoCom to construct and own facilities in the power space, regardless of which party has requested that the facilities be built, requires all competitors of the Joint Venture to lease fiber from BecoCom (id.).

Cablevision claims that such a "leaseback" arrangement is in violation of FCC policy (id., citing Local Competition Order, 11 FCC Rcd. 15499, at ¶¶ 1170 and 1182 (1996)) ("Local Competition Order"). Cablevision requests that the Department order BecoCom to make the terms and conditions for access to the power space publicly available (id. at 95).

(c) BECo

BECo argues that allegations of anti-competitive practices involving access to the power space are beyond the scope of this proceeding (BECo Reply Brief at 41). However, BECo denies the cable companies' claim that the Joint Venture has exclusive access to the BECo system (BECo Initial Brief at 81-82). BECo states that the cable companies have failed to show that they have, in fact, been denied access to the power space (<u>id.</u>). BECo claims that one of

the Intervenors involved in this proceeding requested access to the power space, and BecoCom responded with a proposal for construction, including a price and a schedule (id. at 82, n.49). In addition, BECo argues that the Joint Venture has the same access to the BECo system in that the Joint Venture can opt to sign an ALA with BECo and construct its own facilities in the communication space, or it can request that BecoCom construct facilities for it in the power space (BECo Reply Brief at 44, citing Exh. BE-RSH-1, at 35). BECo further states that if the Joint Venture chooses the latter option, then those facilities will be constructed, owned and maintained by BecoCom, not the Joint Venture (id.). BECo argues that this construction policy is no different than that offered to all potential attachers (id.).

In addition, with respect to construction in the power space, BECo argues the following: (1) under BECo and generally accepted safety standards and federal safety regulations, BECo must control and limit access to the power space on its poles; (2) BECo has never allowed any third party to attach in the power space; (3) the construction of which the cable companies complain is being done by BecoCom, not by the Joint Venture; (4) the construction is being done by BECo's OSHA-certified employees, and OSHA-certified contractors under BECo's supervision; (5) the facilities being constructed are owned by BecoCom, not the Joint Venture; and (6) BECo or BecoCom have constructed similar systems for others (id. at 87).

(d) Joint Venture

The Joint Venture again claims that an examination of the Joint Venture and the terms and conditions of the Joint Venture's contracts with BECo and BecoCom and beyond the scope

of the proceeding (Joint Venture Brief at 11). The Joint Venture does state, however, that it does not construct its own facilities in the power space (<u>id.</u> at 25). All power space facilities are constructed and owned by BecoCom (<u>id.</u>).

iii. Analysis and Findings

The License Agreement provision that designates BecoCom as the only entity that can construct new facilities in the power space does not rise to the level of a cross-subsidy between BECo and the Joint Venture. BecoCom undertakes construction in the power space under the guidelines that BECo has had in place for many years (BECo Reply Brief at 44). There is no evidence that BecoCom has denied access to potential attachers for construction in the power space. In addition, the fact that BecoCom will own all facilities that are constructed in the power space supports the conclusion that no cross-subsidy is occurring as a result of this arrangement (Exh. BE-RSH-7 (Joint Venture Agreements: IRU), at §4(a)). If BecoCom were constructing these facilities and immediately transferring ownership to the Joint Venture, a cross-subsidy might occur. The Joint Venture is being treated the same as any other party that desires to attach in the power space.

The cable Intervenors claim that BecoCom's construction arrangement is discriminatory (Cablevision Initial Brief at 84; NECTA Initial Brief at 33-35). For the cable Intervenors, BECo's ownership of facilities in the power space is not a desirable outcome because, without ownership rights, the cable companies may not be able to control these facilities. The cable Intervenors argue that BecoCom's ownership of facilities in the power space is contrary to FCC precedent. As Cablevision notes, the FCC has found that a utility cannot meet its obligation to

provide non-discriminatory access by requiring the leaseback of facilities. <u>Local Competition</u>

Order at ¶¶ 1170 and 1182 (Cablevision Initial Brief at 84). While the Department is guided but not bound by FCC precedent in this area, we addressed a similar issue in a case involving the ownership of streetlights. In <u>Towns of Acton and Lexington</u>, D.T.E. 98-89, the towns requested ownership of equipment that was located in the power space. BECo opposed such ownership on the grounds that it would compromise safety and reliability. In a Letter Order dated December 24, 1998, the Department stated:

BECo's safety concerns associated with the Towns purchasing equipment located within the power space on [BECo's] utility poles would be most effectively addressed through the implementation of safe work practices by the municipality and reasonable maintenance work makeready preparation by the electric company. In addition, it would also be reasonable for an electric company to require indemnification of the electric company by the municipality for any maintenance performed on the streetlight equipment.

D.T.E. 98-89, at 3, n.2 (1998). We further stated that any affected parties may bring a proceeding to address allegations of discriminatory access where the Department can properly analyze the safety arguments and balance those arguments with access concerns. <u>Id.</u> at 6-7.

Ownership of facilities in the power space does not result in a cross-subsidy, and its final resolution is beyond the scope of this proceeding. While the Massachusetts pole attachment statute and regulations require non-discriminatory access to poles, utilities can legitimately deny access to poles for reasons of safety and reliability of the distribution system. As we stated in D.T.E. 98-89, affected parties may file a complaint pursuant to the pole attachment statute and regulations to address any actual allegations of discriminatory access. In that forum, with an actual dispute before the Department – as distinct from the generalized

claim presented here -- we can properly analyze the safety arguments and balance those arguments with access concerns in a factual and specific context rather than a merely theoretical one.

c. Access to Conduit and Transmission Towers

i. <u>Introduction</u>

Several parties have claimed that BECo allows the Joint Venture access to its conduits and transmission towers while denying access to other parties.

ii. <u>Positions of the Parties</u>

(a) NECTA

NECTA claims that, prior to the creation of the Joint Venture, BECo did not permit any company to own communications lines in its underground conduit (NECTA Brief at 50).

NECTA further states that since the formation of the Joint Venture, BECo has granted BecoCom exclusive rights to own and place communications facilities in BECo's conduits (id.).

NECTA avers that since BecoCom is a provider of dark fiber in competition with other service providers and because BECo continues to turn down requests from CLECs seeking to own dark fiber within BECo's conduit, that the Company is excluding facilities-based competitors from access to its conduit (id.). NECTA claims that this situation forces CLECs that need access to conduit to lease fiber from BecoCom, a practice NECTA argues has been rejected by the FCC (id. at 51). NECTA argues that the Department should order BECo to permit third parties to own fiber located in BECo's conduit, so long as installation and maintenance is performed by BECo or other qualified contractors (id. at 90).

Regarding access to transmission towers, NECTA states that under the License Agreement, BECo assigned BecoCom the ability to install, maintain and operate new facilities on its transmission towers (id. at 51-52). NECTA observes that in November 1997, the legislature amended G.L. c. 166, § 25A to permit third-party attachments to transmission facilities (id. at 52). NECTA claims that BECo was not aware of this change in the law requiring non-discriminatory access to transmission towers (id.). NECTA argues that denial of access to transmission towers has a serious effect on competition since it infringes the ability of cable companies and CLECs to install "long haul" cable runs and forces them to instead use a "roundabout" route on distribution poles (id. at 52-53). NECTA maintains that the Joint Venture has access to these transmission facilities and is, therefore, able to install a more direct route for its facilities (id.). NECTA requests that BECo be required to permit third parties to attach and own fiber located on BECo's transmission towers (id. at 91-92).

(b) Cablevision

Cablevision alleges that the 1996 Telecommunications Act requires BECo's transmission and distribution facilities be made available to CLECs and cable operators on a non-discriminatory basis (Cablevision Brief at 81, citing 47 U.S.C. § 224(f)). Cablevision states that the exclusive right to access to transmission towers that was given to the Joint Venture through the IRU is in violation of federal law (id. at 82).

(c) BECo

BECo denies the cable companies' specific claim that the Joint Venture is building facilities in BECo's conduit in the City of Boston (BECo Reply Brief at 46). BECo also states

that the cable companies are free to avail themselves of the capacity of that conduit system on the same terms as any other attacher (id.). Under these terms, third parties are allowed access to the conduit, but only BECo employees or qualified contractors can perform work on these facilities for safety reasons (id. at 44, 46). BECo claims that there is no evidence in this proceeding that requests for access to BECo's conduit system have been denied (id. at 46). In addition, BECo claims that the conduits contain very high voltage electricity that poses a safety hazard to those who work in close proximity to it (id. at 48). For this reason, BECo does not allow outside workers to access these facilities (id.). Regarding access to transmission towers, BECo avers that there is presently no interest in access to these facilities from the cable companies (id. at 46). BECo claims that access to this non-utility backbone system was offered to NECTA members, but none has expressed any interest (id.).

(d) <u>The Joint Venture</u>

The Joint Venture maintains that the issue of access to conduits and transmission towers is beyond the scope of this proceeding since it is completely unrelated to the question of whether BECo violated D.P.U. 93-37 (Joint Venture Brief at 9).

iii. Analysis and Findings

Similar to the issue of access to the power space, there is no evidence in the present record that the cable Intervenors have been denied access to BECo's conduits or transmission towers. Therefore, we cannot find that a cross-subsidy exists. In the event of an actual denial of access to BECo's conduits or transmission towers, affected parties may file a complaint pursuant to the Department's pole attachment statute and regulations.

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d. <u>Other Issues</u>

i. Introduction

Several other issues were raised concerning pole attachments: (1) BECo's compliance with the National Electric Safety Code ("NESC") (Exh. NECTA-RSH-26); (2) BECo's payments to Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") for attachments in the power space on jointly-owned poles; and (3) attachment fees charged to BecoCom and CLECs.

ii. <u>Positions of the Parties</u>

(a) NECTA

NECTA argues that BECo is not adhering to the NESC when making attachments for the Joint Venture (NECTA Brief at 59). NECTA claims that BECo is installing Joint Venture attachments within 30 inches of wires in the power space, which is in violation of the 40-inch separation required by the NESC (id. at 60). NECTA claims that BECo is placing Joint Venture attachments within twelve inches of other communications conductors, while the NESC requires a twelve-inch separation (id.). NECTA avers that BECo also is placing Joint Venture communication attachments in the power space, which is not permitted by the NESC (id.). NECTA requests that the Department require BECo to adhere to the NESC (id. at 85).

In addition, NECTA states that BECo is "cheating" Verizon of revenues on jointly-owned poles (<u>id.</u> at 65). According to NECTA, BECo contends that 100 percent of revenues from attachments that are located in the power space of jointly-owned poles belong to BECo (<u>id.</u>). NECTA claims that Verizon has challenged this practice by BECo (<u>id.</u>). NECTA

calculates that Verizon is losing approximately \$400,000 per year due to this pricing practice (<u>id.</u> at 66).

Finally, NECTA declares that BECo is charging BecoCom the lowest possible rate for pole attachments, ⁶⁶ which is the cost-based rate approved by the Department in D.P.U./D.T.E. 97-82 (<u>id.</u>). NECTA also maintains that BECo continues to charge "non-cable" attachers, such as Raytheon, a non-cost based pole attachment rate (<u>id.</u> at 66-67). NECTA claims that BECo is continuing to charge "illegal" pole attachment rates to CLECs even after this issue was raised in D.P.U./D.T.E. 97-82 (<u>id.</u> at 67). According to NECTA, BECo stated on rebuttal that it would prospectively discontinue its practice of charging CLECs higher attachment rates (<u>id.</u>).

(b) <u>BECo</u>

BECo claims that the assertions of violations of the NESC by NECTA are without merit (BECo Initial Brief at 92). BECo avers that where the overhead electric wires meet certain qualifications, the NESC's 40-inch space requirement is properly reduced to 30 inches (<u>id.</u>, <u>citing Exh. NECTA-RSH-26 (NESC Code)</u>, at Table 235-5, n.6). In addition, BECo states that neither the 30-inch nor the 40-inch rule applies where the communications cable is installed and maintained in the power space by power-qualified workers working for the distribution company (<u>id.</u> at Table 235-5, Item 1(b) at note 10). BECo also states that the NESC has no specific requirement for the 40-inch "neutral zone" as referenced by NECTA (<u>id.</u> at 93).

^{\$7.39} for solely-owned poles, \$3.70 for jointly-owned poles.

^{\$14.00} for solely-owned poles, \$8.00 for jointly-owned poles.

Finally, BECo states that since these allegations do not concern claimed violations of D.P.U. 93-37, they are outside the scope of this proceeding (id. at 94).

Regarding NECTA's allegations on behalf of the Verizon and the CLECs, BECo argues that these parties have not intervened or submitted any claims in this proceeding (BECo Reply Brief at 47-48). As a result, BECo argues that the Department should refrain from addressing concerns relevant to companies that are not parties to this proceeding (id. at 48).

(c) <u>The Joint Venture</u>

The Joint Venture claims that the Department does not have the authority to either adopt or enforce the NESC in this proceeding (Joint Venture Brief at 25-26). Further, the Joint Venture states that if the Department were to determine that the NESC should be adopted, under the rules of procedure, the Department would need to implement a rulemaking proceeding (id. at 26, citing 220 C.M.R. §§ 2.00 et. seq.).

iii. Analysis and Findings

The NESC is a voluntary industry standard describing the basic provisions for safeguarding persons from hazards arising from the installation, operation, or maintenance of electric supply and communication lines and associated equipment, as well as work rules for the construction, maintenance and operation of this equipment (Exh. NECTA-RSH-26). Although certain states have codified the NESC, it remains a voluntary standard in Massachusetts. Nevertheless, even though voluntary here, the NESC remains the primary standard for Massachusetts' utilities in determining pole attachment operating practices. If adopted by a utility, the NESC must be applied in a non-discriminatory manner. In the present case, the

record contains no evidence that BECo applies the NESC differently for competitors than it does for itself and its affiliates, therefore no cross-subsidy can be found.

Regarding the issue of payment by BECo to Verizon for attachments in the power space on jointly-owned poles, as Verizon is not a party to this proceeding, it is not appropriate to address those claims in this case. NECTA has no standing to plead jus tertii. The same is true for issues regarding different attachment fees charged to BecoCom and CLECs. 68

3. Terms and Conditions Issues

a. <u>Makeready</u>

i. Introduction

Several parties have raised the issue of the terms and conditions that BECo has in place for the process of makeready, or the preparation of a pole prior to the attachment of an additional line. These parties argue that the cable companies must pre-pay for such work, while the Joint Venture pays for makeready monthly, in arrears as the construction progresses. In addition, concerns were raised about the timeliness of the makeready work.

In D.P.U./D.T.E. 97-82, the Department established the appropriate, cost-based pole attachment rate that should be charged for pole attachments in the BECo service territory. The Department has also stated that negotiated rates are to be encouraged, with the parties coming to the Department for assistance only in circumstances when they fail to agree. A-R Cable Services, Inc. v. Massachusetts Electric Company, D.T.E. 98-52, at 7. Because the Department has established what the cost-based rate should be for attachments made in the BECo service territory, parties should be able to resolve this issue of pricing on their own. In addition, the new pole attachment regulations require BECo to charge affiliates the same rate it charges other companies. 220 C.M.R. § 45.10.

ii. <u>Positions of the Parties</u>

(a) NECTA

NECTA argues that while the "typical" ALA does not set any strict time line for the completion of makeready work, the IRU sets out specific deadlines that BecoCom must respond to when undertaking construction on behalf of the Joint Venture (NECTA Brief at 57-58). NECTA claims that BECo may even perform makeready simultaneously with installation, a process that has never been extended to cable operators (id. at 58). NECTA avers that BECo has exempted BecoCom from the makeready process (id.). NECTA adds that BECo avoids makeready procedures on jointly-owned poles and, by so doing, cuts Verizon out of the makeready process (id.). Consequently, BecoCom is the only party on a jointly-owned pole that is involved in the makeready process (id.). NECTA also argues that the coordination of makeready work creates difficulty for the cable companies in terms of timely access to the poles (Exh. NECTA-PG-1). NECTA requests that the Department adopt a tracking procedure to ensure that makeready is performed at parity (NECTA Brief at 89-90).

(b) BECo

BECo argues that NECTA's complaint is purely theoretical and that the Department has already rejected these claims (BECo Initial Brief at 82, 84, citing D.P.U./D.T.E. 97-82).

BECo contends that NECTA has offered no evidence that the up-front requirement for makeready work has presented a problem (id. at 83). In addition, BECo argues that NECTA has not presented any evidence that they had ever asked and been denied accommodation on the timing of makeready payments (id.). BECo claims that such a request was made on at least

one occasion and that the request was accommodated (<u>id.</u>). Regarding the timing of makeready work, BECo claims that NECTA's arguments are without merit because NECTA did not present any evidence of a single instance of makeready performed for the cable companies that was unreasonable (<u>id.</u>).

iii. Analysis and Findings

In D.P.U./D.T.E. 97-82, at 50-51, the Department stated:

Of the many issues raised by the Complainants, only those dealing with specific "makeready" terms and conditions (the requirement that "makeready" costs be paid in advance and the timeliness of the performance of "makeready" work) are within the scope of this proceeding and will be dealt with directly here. With respect to both of these "makeready" provisions, the Department finds that there is insufficient evidence in the record to show that these terms and conditions are unreasonable.

As was the case in D.P.U./D.T.E. 97-82, insufficient evidence was presented in this proceeding to support allegations that BECo's makeready practices are discriminatory. The Department can not issue orders based on unsupported claims. If a cable company can present evidence that it has been denied terms and conditions or makeready provisions that BECo applies to itself or its affiliates, there is a forum to address these complaints pursuant to the pole attachment statute and regulations.

b. <u>Overlashing</u>

i. Introduction

Issues have been raised regarding BECo alleged proposal to charge a fee for overlashing, the process by which a company already on a distribution pole can build out a "broadband" system without having to get a license from the pole owner(s), go through the

makeready process and construct new strand. "Overlashing" occurs when new lines are strung along and affixed to lines already in place. Typically, the new line and the old may be of common ownership, but common ownership is not a necessary defining characteristic.

ii. Positions of the Parties

(a) <u>NECTA</u>

NECTA claims that BECo has attempted to impose fees for overlashing (NECTA Brief at 68). Arguing that fees for overlashing have been deemed improper by the FCC, NECTA requests that the Department order BECo not impede overlashing or to impose separate charges for overlashing (id. at 92).

(b) <u>BECo</u>

BECo claims that on one occasion, when an existing third-party attacher had effectively sub-let space on the pole by allowing an additional person, not a party to an ALA, to overlash, BECo had tried to impose a "modest administrative fee" to cover the cost of keeping track of who was on the poles (BECo Initial Brief at 91, n.55). Facing an objection by the attacher, BECo stated that it declined to charge the proposed fee (<u>id.</u>).

iii. Analysis and Findings

Because this issue does not constitute a potential cross-subsidy from BECo to the Joint Venture, it is beyond the scope of the issues to be addressed in this proceeding. As is evidenced by BECo's change of decision with respect to whether to charge an administrative fee, parties are often able to negotiate satisfactory rates, terms, and conditions on their own without resort to the Department. In the event that parties are unable to resolve an actual

overlashing dispute, they may file a complaint pursuant to the Department's pole attachment statute and regulations.

c. <u>Joint Venture Signing on to an ALA for Solely-Owned and Jointly-Owned Poles</u>

i. <u>Introduction</u>

Parties allege that the Joint Venture is not subject to the same ALA that all third-party attachers must sign before being allowed to attach to poles. If the Joint Venture is not subject to the ALA, it is argued that this could result in arrangements that favor the Joint Venture over other third-party attachers.

ii. Positions of the Parties

(a) <u>NECTA</u>

NECTA argues that BECo has excused BecoCom (and, indirectly, the Joint Venture) from entering into the standard ALA applicable to all other facilities-based attaching parties to poles solely-owned by BECo or jointly-owned with its co-owner, Verizon (NECTA Brief at 48). Instead, NECTA argues that BECo has "crafted" arrangements that are designed to provide special rights and exclusive and discriminatory access to its poles (id.). NECTA contends that BecoCom and the Joint Venture may "speed ahead" regardless of standards while its competitors are left to "unchecked denials of access, delays during the makeready process under the ALA, and more stringent standards" (id. at 49-50). NECTA requests that the Department require BecoCom to abide by an ALA for all attachments (id. at 81-82).

(b) <u>BECo</u>

BECo argues that, because the Joint Venture is not actually engaged in the act of constructing facilities on poles, (<u>i.e.</u>, BecoCom constructs these facilities for the Joint Venture), the Joint Venture does not need to sign an ALA (BECo Initial Brief at 87, n.51). BECo states that if the Joint Venture were to engage in the construction of its own facilities in the communication space, it would be treated exactly the same as any other third-party attacher, meaning that, among other things, an ALA would be executed with Verizon and BECo (<u>id.</u>).

iii. Analysis and Findings

There is insufficient evidence that the Joint Venture has received preferential treatment from BECo because it was not subject to an ALA. NECTA's arguments imply that there is a standard ALA, which is not the case. The ALA is a negotiated agreement between third-party attachers and the owner(s) of the pole. Based on the record in this case, we are not convinced that the absence of a standard ALA has had any negative impact on the cable companies. As we stated in D.P.U./D.T.E. 97-82, if the cable companies can allege any specific instances of intentional delays on the part of BECo, they are free to file specific complaints with the Department, detailing circumstances of their claims. D.P.U./D.T.E. 97-82, at 51 (1998).

C. <u>Sharing of Employees</u>

1. Introduction

BecoCom has no full-time employees; the officers of BecoCom are also officers of BECo⁶⁹ (Exh. BE-PAF-2; Tr. 1, at 105-106; Tr. 4, at 691-694). Issues were raised concerning this sharing of employees and its potential effect on competition.

2. Positions of the Parties

a. NECTA

NECTA argues that the dual responsibilities of BECo employees whose duties include BecoCom render the delegation of pole authority an illegal barrier to competition (NECTA Brief at 47). NECTA contends that all applications to BecoCom for construction are reviewed by BecoCom's president, Mr. Hahn, who also has a vested interest in RCN's success (id., citing Tr. 19, at 3117; Tr. 6, at 1112-17). Because Mr. Hahn has access to the locations, architecture, strand counts, and electronics involved in a new entrant's construction application, NECTA argues that this broad access to competitively sensitive information is of a nature that was found to be unlawful by the FCC pursuant to 47 U.S.C. § 224 (id., citing Marcus Cable Associates, L.P. v. Texas Utilities Electric Co., 12 FCC Rcd. 10362; 1997 FCC LEXIS 3803 (July 21, 1997), application for review filed August 20, 1997). In addition, NECTA claims that this situation precludes any possibility of confidential treatment of competitors' construction

Mr. Hahn is both the president of BecoCom and BECo's vice-president of technology, research, and development; Mr. Frangules is both BecoCom's chief financial officer and BECo's vice-president of strategic planning; Thea Convisser is both BecoCom's clerk and BECo's clerk (Exh. BE-PAF-2; Tr. 4, at 691-694). Mr. Hahn is also a member of the RCN-BecoCom board of directors (Exh. BE-PAF-2; Tr. 23, at 3596-3599).

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plans, and that BECo has not proposed any special procedures for handling competitive sensitive information (NECTA Brief at 47, <u>citing Tr. 3</u>, at 506-14).

b. BECo

According to BECo, NECTA's complaints about the disclosure of competitively sensitive information are independent from the existence of BecoCom (BECo Reply Brief at 45). The Company argues that if BecoCom had never been formed, BECo itself would have held the investment in the Joint Venture, and handled access to its power space (id.). Thus, BECo argues that the only solution to NECTA's complaint would be to prohibit BECo from either conducting a commercial telecommunications business or owning an interest in any entity that does -- which the Company considers would be an illegal restriction on BECo's operations (id.). Finally, BECo maintains that the location of any telecommunication facilities on BECo-owned facilities is either a matter of public record (for example, facilities for located in underground conduits within the City of Boston) or public inspection (where the facilities are erected on overhead poles) (id.). Therefore, the Company maintains that there is little that would be confidential about the information to which BecoCom would have access (id.).

3. Analysis and Findings

Under the Department's Standards of Conduct, 220 C.M.R. § 12.03 (15), distribution companies are prohibited from sharing employees with competitive energy affiliates.⁷⁰

A "competitive energy affiliate" is defined to be any competitive affiliate that is engaged in the sale or marketing of natural gas, electricity, or energy-related services on a competitive basis. 220 C.M.R. § 12.02 (4). Energy-related services are defined as "those services the costs of which have been recovered by distribution companies (continued...)

BecoCom is engaged in the construction of telecommunication facilities, and, through its joint venture with RCN, the provision of telecommunication service. Therefore, BecoCom does not constitute an "energy affiliate" under the Department's Standards of Conduct regulations.

Although the Standards of Conduct's restrictions on shared employees do not apply to BecoCom, we recognize that BecoCom's dual control of pole attachment access and its own use of pole attachments through the Joint Venture has the potential to result in misuse of competitively sensitive information. While the potential for misuse exists, we have been presented with no clear evidence that such conduct has, in fact, occurred. NECTA has based its claims on broad allegations, unsupported by any specific evidence, that BecoCom has misused competitively sensitive data received by it in the course of business. Broad allegations do not establish substantial evidence for the finding NECTA seeks.

While there are possible mechanisms to ensure that the potential for misuse of competitively sensitive information is not realized, these remedies are neither viable nor in proportion to the potential harm. One remedy would to prohibit BECo from entering the telecommunication business either directly or through an affiliate, a restriction that may be contrary to the 1996 Telecommunications Act. Another remedy, the creation of an independent entity for the sole purpose of controlling the access to BECo's power space for telecommunications purposes, raises concerns about BECo's ability to insure the integrity of its distribution system. Because there is insufficient evidence on the present factual record of any

^{(...}continued) through rates approved by the Department." 220 C.M.R. § 12.02 (9).

actual misuse of competitively sensitive information, we decline to take any action at this time with respect to the sharing of employees by BECo and BecoCom.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, it is hereby

<u>DETERMINED</u>: That Boston Edison Company exceeded the \$45 million investment cap set by D.P.U. 93-37 by excess investment of \$3,936,881 and thereby acted beyond the scope of G.L. c. 164, § 17A, as construed in Department precedent; and it is

ORDERED: That, pursuant to G.L. c. 164, §§ 76, 76A, and 81, Boston Edison

Company is directed to take all measures necessary to receive reimbursement from Boston

Edison Technology Group either directly or through NStar, of \$3,936,881; and to file with the

Department confirmation that the reimbursement had been received from Boston Edison

Technology Group, along with the required journal entries, within 30 days from the date of this

Order; and it is

FURTHER ORDERED: That Boston Edison Company is directed to return to ratepayers the carrying charges associated with the over-investment in Boston Edison Technology Group, applying a carrying charge of 10.46 percent to the over-investment balance of \$3,936,881 as of December 31, 1997, and compounded monthly through the date of this order, in the form of a credit to the Company's transition costs; and it is

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<u>FURTHER ORDERED</u>: That the parties shall comply with any and all directives contained herein.

By Ord	er of the Department,
James (Connelly, Chairman
W. Rol	pert Keating, Commissioner
Paul B.	Vasington, Commissioner
Eugene	J. Sullivan, Jr., Commissioner
Deirdre	K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).